



THE INDIAN LAW REPORTS, BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON
APPEAL FROM THAT COURT.

Editors.

L. J. ROBERTSON, *Barrister-at-Law.*

W. L. WELDON, *Barrister-at-Law (Acting).*

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PRIVY COUNCIL J. V. WOODMAN, *Barrister-at-Law.*

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B. N. LANG, *Barrister-at-Law (Acting).*
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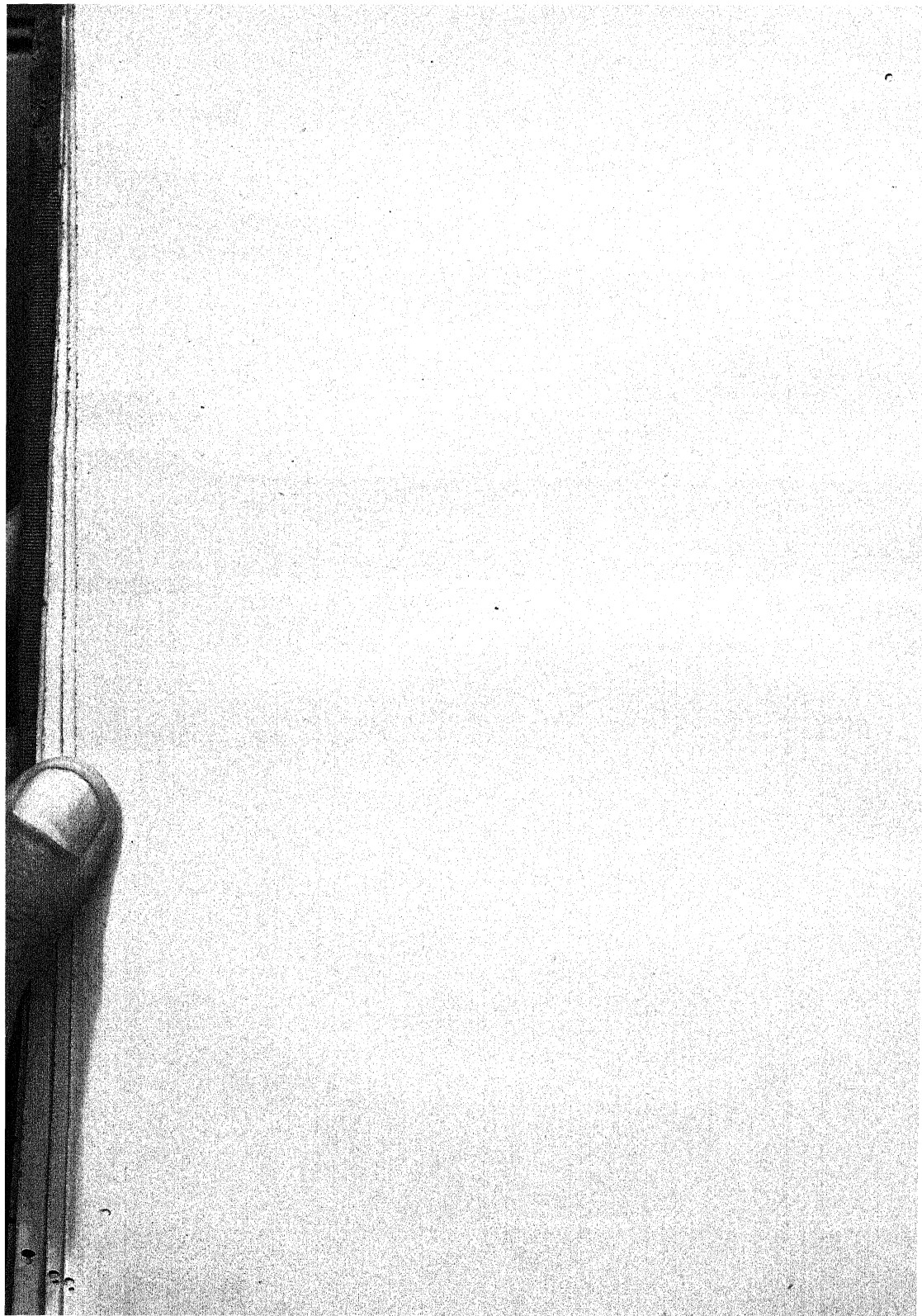
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THE INDIAN LAW REPORTS,

Bombay Series.

ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batchelor.*

PAUL BEIER AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,
v. CHOTALAL JAVERDAS (ORIGINAL DEFENDANT), RESPONDENT.*

1904.
September 16.

Contract—Construction—Custom of trade in Bombay—Vendor and Purchaser—Principal and Agent—Goods ordered nett free godown—No remuneration fixed—Variance between printed and written terms—Liability to account.

The plaintiffs sued to recover the balance due to them for goods delivered by them to the defendant under certain indents, the first clause of the printed portion of which ran as follows:—"We ^{we}_I hereby request and authorise you to order, and, if possible, buy and send ^{us}_{me} the undermentioned goods on ^{our}_{my} account and risk and ^{we}_I bind ^{ourselves}_{myself} to pay for the same at the prices and conditions specified below." Other printed clauses provided that goods were to be landed by the defendant, who was to pay the import duty; the plaintiffs were not to be liable for damages though they might have advised the defendant of having placed the order, or any portion of it; the liability of the sellers and buyers respectively, was to be the same as though a separate contract had been made out and signed in respect of each instalment; insurance was to be effected in Europe and the plaintiffs were to be free of all responsibility regarding it; the plaintiffs were not to be bound by any clauses or customs not specifically mentioned in the indent; and anything written on the indent form by the buyers in any language, other than English, except their signature, was to be null and void.

To this indent form the following matter, *inter alia*, was added in writing:—"12 Cases E, contg. 18 Pcs. of 25/30 yds. Plain Velvet 1421/18 at 1s. 9d. per yard. Nett free godown including duty. 60 days. 6 per cent. Int. after due date."

The plaintiffs brought out the goods referred to in the indents and the defendant took delivery of a portion of the same, but refused to take delivery of

* Suit No. 614 of 1904, Appeal No. 1317.

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the remainder. The defendant contended, by way of defence and counter-claim, that the plaintiffs were his commission agents for the purpose of purchasing goods in the European markets, and that they were bound to furnish an account of the difference, if any, between the cost price of the goods and the price mentioned in the indents.

The lower Court, by an interlocutory judgment, held that the relation between the parties was that of principal and agent, and ordered the plaintiffs to furnish an account. The plaintiffs appealed. On appeal the preliminary objection was taken that the lower Court had erred in excluding evidence as to the custom of trade in Bombay.

By an order dated the 7th March 1904 the suit was referred back to the lower Court in order that such evidence might be taken.

On further hearing, after such evidence was taken —

Held, that there was an inconsistency between the printed and the written provisions of the indent. The print, however, could not be discarded, but it was necessary to discover the real contract of the parties from the printed as well as from the written words.

Gumm v. Tyrie⁽¹⁾ followed.

Held, also, that according to the custom of trade in Bombay, when a merchant requests or authorizes a firm to order and to buy and send goods to him from Europe, at a fixed price, nett free godown, including duty, or free Bombay harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer. And it does not make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant.

APPEAL from Russell, J.

In the years 1900 and 1901, Chotalal Javerdas, the defendant, by various indents numbered respectively 109, 134, 218, 318, ordered out goods from Europe through the plaintiffs, Messrs. Beier and Co.

The indents were composed partly of a printed form and partly of written matter added thereto.

The printed form ran as follows :—

A. A.	...	...	...	...	...	...	190
Indent No.	.....					

Messrs. Beier and Co., Lyons.

Dear Sirs,

^{we}_I hereby request and authorise you to order, and, if possible, buy and send ^{us}_{me} the undermentioned goods on ^{our}_{my} account and risk and ^{we}_I bind ^{ourselves}_{myself} to

⁽¹⁾ (1864) 33 L. J. (Q. B.) 97 at p. 111.

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pay for the same at the prices and conditions specified below. The goods to be shipped by steamer to Bombay and the invoice amount or amounts, including European charges, to be drawn for upon $\frac{us}{me}$ payable at Bombay at 60 days' sight, with documents attached for payment, which draft or drafts $\frac{we}{I}$ hereby pledge $\frac{ourselves}{myself}$ to duly accept on presentation and pay at maturity, or as soon as the goods have arrived at abovesaid port of destination, whichever may first happen. Should $\frac{we}{I}$ fail so to accept or pay the draft or drafts, $\frac{we}{I}$ hereby authorize you or your nominated Agents to dispose of the documents or goods for $\frac{our}{my}$ account and risk, either by private sale or public auction, when, where, and how you consider advisable, and without any reference to $\frac{us}{me}$, and $\frac{we}{I}$ hereby engage to make good to you any loss or deficiency which may arise from such sale or sales and all expenses, together with 5 per cent. commission and interest at 9 per cent. per annum, $\frac{we}{I}$ waiving $\frac{our}{my}$ claim to profit on the goods, should there be any.

The goods to be taken charge of, landed and passed through the Custom House by $\frac{us}{me}$ or by $\frac{our}{my}$ nominated Agent, and Import duty will be paid by $\frac{us}{me}$ on arrival of the vessel.

It shall be optional for you to execute the whole or any part of this order : and if through the failure of the manufacturers or strikes or accidents of whatever nature, the goods or any portion thereof are not shipped or delivered at the stipulated time ; or if you should have to reject the goods, or any portion thereof, on account of late or bad delivery, this indent, or such portion thereof remaining unexecuted or unshipped, may be considered cancelled, and $\frac{we}{I}$ shall not be entitled to claim any damages for such total or partial non-delivery, notwithstanding your having previously advised $\frac{us}{me}$ of having placed the order or any portion thereof.

Date of delivery to carrier in or other manufacturing place in Europe shall count as date of shipment ; and a delay not exceeding 15 days beyond the time stipulated for shipment shall be no ground for cancelling this Indent, or any portion thereof, or afford reason for refusing acceptance of the goods or payment of the drafts on their due date. You shall, moreover, not be responsible if the goods ordered herein or any portion thereof be shut out by the steamer ; not for any delays arising from alterations in the sailing dates, or the suppression of the departures of the steamers for which the goods were destined to be shipped, and $\frac{we}{I}$ hereby agree to personally bear the risks and consequences of such occurrences $\frac{and}{or}$ delays.

$\frac{we}{I}$ agree to accept your invoices as conclusive proof of the number $\frac{and}{or}$ contents of the packages therein stated.

If the goods or any portion thereof are shipped or have arrived prior to the time stipulated, $\frac{we}{I}$ shall have no right to reject the same, but shall accept

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them with an extension of the due date of payment corresponding to the period that the goods are shipped prior to the time contracted for.

$\frac{We}{I}$ shall not be entitled to refuse to accept any drafts in respect of goods of which the representing samples have not been submitted to $\frac{us}{me}$. Partial damage or short quantity or measure or inferiority or difference in quality or designs or colours shall not be a ground of objection to accept the drafts ^{and} or take delivery of the goods; and if any dispute should arise respecting the goods, you are always to have the option of cancelling them, or should you not elect to do so, two European merchants, resident in Bombay, shall, after $\frac{we}{I}$ have paid for the goods, be nominated arbitrators, one by each party, to survey the goods and determine the points in dispute, and decide upon them as they may consider just and equitable to both parties: and in the event of their disagreeing, they shall appoint an umpire and their, or in the latter case, his decision shall be final and binding upon both parties, and the provisions of the Code of Civil Procedure relating to arbitration shall be applicable to such arbitrations. This provision for arbitration shall be an absolute bar to any suit or legal proceedings, otherwise than for the enforcement of the award, in respect of all matters so agreed to be the subject of reference, and all costs and expenses attending such arbitration shall be in the discretion of the arbitrators or arbitrator or umpire, and shall be paid by the party against whom the award is made.

All claims in respect of goods covered by this Indent must be submitted in writing *within 14 days after their arrival at sea-port of destination*, after which time $\frac{we}{I}$ shall be precluded from raising any claim or objection even though there should exist grounds for such claim or objection.

Loss of the vessel shall cancel the portion of this contract shipped in the vessel lost.

Goods ordered in sterling currency are to be drawn for with interest added at the rate of 6 per cent. per annum from date of invoice till approximate due date of remittance reaching home payable at the current demand rate of exchange in London, and in accordance with rules from time to time established on this behalf by the Exchange Banks in Bombay.

This agreement is to be deemed and construed as a separate contract in respect of each instalment of goods, *and the rights and liabilities of the sellers and buyers respectively shall be the same as though a separate contract had been made out and signed in respect of each instalment.*

Insurance to be effected in Europe and you to be free of all responsibilities regarding it.

In case of war, whatever may be the terms of $\frac{our}{my}$ indent, $\frac{we}{I}$ give you liberty to insure against war risk on $\frac{our}{my}$ account.

You are not bound by any arrangement, clauses, or customs which are not specially mentioned in this indent.

$\frac{We}{I}$ hereby expressly agree that any actions which may arise in respect of this contract shall be brought before the competent Courts in Bombay, who shall

have full and complete jurisdiction with regard to such actions, no matter where the cause of action may have arisen.

Anything written on this Indent form by the buyers in any language other than English, except their plain signature, shall be null and void.

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To Indent No. 109 the following was added in writing:—

10 cases each contg. 10 Pieces of 25/30 yds. Plain Velvet 38087/18 inches at 2/4 per yd. Nett free godown including duty. 60 days. 6 per cent. int. after due date.

Assortment.

Colours—Scarlet.	Chocolate.	Blue.	Purple.	Green.	Black.
2	2	2	2	1	1

Quality, Border, Shades and (No. 1221) as supplied against case 10082.

709

Shipment in 5 lots:—Two cases January, and out of remaining 2 cases to follow at an interval of 2/3 weeks.

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To Indent No. 134 was added:—

15 cases Ea. contg. 20 Pcs. of 25/30 yds. German Flowered Velvet 1205/18 at 1s./11d. per yd. nett free godown including duty. Sixty days. 6 % Int. after due date.

Assortment.

1 Pec. of Patt. 1 but green ground and scarlet flowers
Etc. Etc. Etc.

Each case to contain 20 pieces in the above 20 designs and colors.

Shipment:—4 cases January, 4 cases February, 4 cases March and 3 cases April.

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Indents Nos. 218 and 318 were of a similar nature.

On the 24th of January 1901 Messrs. Beier and Company wrote as follows:—

Lyons, 24th January 1901.

Mr. CHOTALAL JAVERDAS,

Bombay.

Dear Sir,

We have the honour to report on the following indent kindly entrusted to us for execution.

Indent No. 109

Date

confirmation.

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10 cases each containing 10 pieces 25/30 yards 18".

Plain Velvet Quality, price, shipment, and terms as per indent. Assortment and border changed as per note have been placed.

Yours faithfully,
P. P. on Beier & Co.,
ARTHUR BEIER.

On the 23th July 1901, the following letter was written by the plaintiffs:—

Lyons, 26th July 1901.

Mr. CHOTALAL JAYERDAS,
Bombay.

Dear Sir,

We have the honour to report on the following indent kindly entrusted to us for execution.

Indent No. 318 Date 15th June confirmation 5th July.

12 cases each containing 16 pieces 18" 25/30 yards.

Plain Velvets 1421
have been placed.

Yours faithfully,
BEIER & Co.

The plaintiffs brought out the goods referred to in the indents and the defendant took delivery of a portion of the same, but refused to take delivery of the remainder.

The plaintiffs thereupon filed a suit to recover the sum of Rs. 4,724-5-0, being the balance, which, they alleged, was due to them from the defendant.

The written statement of Chotalal Javerdas contained, *inter alia*, the following passage:—

11. The defendant says that the plaintiffs were his Commission Agents for the purpose of purchasing goods in the European markets. The indents given to them are merely orders to purchase such goods as are mentioned therein on defendant's account. The defendant says that the prices mentioned in the said indents are limits which the plaintiffs were not to exceed while executing the defendant's orders. The defendant has grave reasons to believe that the plaintiffs have purchased goods on defendant's account at prices lower than those mentioned in the different indents given by the defendant. The defendant submits that the plaintiffs are not entitled to charge him any prices higher than those actually paid by them for the said goods, and that on the taking of accounts the defendant ought only to be debited with the prices actually paid by the plaintiffs and not the prices mentioned in the indents.

The defendant accordingly prayed, by way of counter claim.

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That an account may be taken by and under the directions of this Court of all the dealings and transactions had between the plaintiffs and the defendant on the basis contended for in paragraph 11 hereof, and that on taking such accounts whatever may be found due by the one party to the other may be ordered to be paid by such party as may be found indebted.

Raikes with *Scott* (Advocate General) and *Davar* for the defendant :—The relation between the parties was clearly that of principal and agent. It was never suggested before the hearing that the plaintiffs were vendors of the goods. The terms of the indent are inconsistent with such a relation. In the first paragraph it is expressly stated that the goods were to be bought and sent out on the defendant's account and risk. In the third paragraph of the indent and also in the correspondence the expression "placing the order" is used. This shows that the plaintiffs were acting as agents and not as vendors. The figures added in writing to the printed form were limits, which the plaintiffs were not to exceed, in purchasing the goods. The defendant therefore is entitled to be paid the difference if any between the cost price and the price mentioned in the indents, see *Mahomedally Ebrahim Pirkhan v. Schiller Dosogne & Co.*⁽¹⁾

Jardine and *Robertson* for the plaintiffs in reply :—The relation between the parties was that of vendors and purchasers. The expression "on our account and risk" in the first clause of the indent was redundant, having regard to the express terms in writing. The second paragraph was also over-ridden by the written terms. With reference to the 3rd clause, the plaintiffs were not manufacturers and had not ready stocks, therefore, the clause was not inconsistent with a relation of vendor and purchaser. It provided for the failure of the vendor under certain circumstances. Clauses 7, 8 and 9 are not inconsistent with the relation of vendor and purchaser and in clause 5 the expression "your invoices," *i. e.*, not the manufacturer's invoices, is used. The expression "nett free godown including duty" in the written terms meant that the plaintiffs had to pay the cost of the goods, the shipping charges, the carriage to port of shipment, freight, insurance, landing charges, clearing charges, custom's duty, Port Trust dues and godown rent in Bombay;

(1) (1889) 13 Bom. 47C.

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but no rate of remuneration was mentioned. It follows, that Messrs. Beier & Co. could make no profit and get no remuneration, except out of the price, at which they purchased from their vendors.

On the 19th June 1903, the following interlocutory judgment was delivered by

RUSSELL, J.:—This case has been going on before me for the last 3 days. It is an extremely interesting case and I have considered it from all its bearings during that time, and, it being a commercial case, I think it desirable to express my conclusions without delay. Now, the first question to consider is what are the pleadings in this case. The plaint has been as observed by Mr. Raikes drawn in a most careful manner and we do not find in it any suggestion whatever of the plaintiffs being the vendors of the goods. This appears from the first paragraph of the plaint and it will be seen from the first paragraph of the written portion of the indent No. 109 that the defendant ordered 10 Plain Velvets, 38087—18 inches at 2/4. In November 1900, Beier writes that the order referred to “has been placed and we are pleased to inform you that the maker agrees to reserve this quality exclusively to our new firm.” In the written statement, in paragraph 11, the defendant says that the plaintiffs were his Commission Agents for the purpose of purchasing goods in the European markets, and further in paragraph 12 he prays, that an account may be taken by and under the directions of this Court of all the dealings and transactions had between the plaintiffs and defendant on the basis contended for. I do not know whether I have formed a wrong opinion with regard to this, but from the way Mr. Jackli gave his evidence it seems to me that the above quoted paragraph was very probably unpleasant to the plaintiffs. They did not quite like it and consequently they raised the question “whether the relations of the plaintiffs and defendant were that of vendors and purchasers or principal and agents.” At all events in their affidavit of the 16th February 1903 we have the first mention of this question. Because we find, the plaintiffs in paragraph 3 of the affidavit dated 16th February 1903 have made the following statement: “That the

plaintiffs have in their possession in Lyons in France documents which are relevant to the suit only in the event of the issue as to whether the plaintiffs were the agents of the defendant to purchase the goods in question in the suit for him at the best price not exceeding a limit or whether the plaintiffs were not vendors at a particular price being determined in favour of the defendant." This is the first intimation we have of this question being raised. Accordingly on the 2nd April the Judge's order was made setting down the issue "whether the relation of the plaintiffs and defendant were vendors and purchasers or principal and agents for trial. It is highly desirable that the parties as far as the Court goes be prevented from going into unnecessary expense, which they would undoubtedly have had to incur if the inspection of the plaintiffs' documents had been allowed to the defendant as asked for by him. To come to a satisfactory conclusion on this point, we have to decide the construction of the contract supplemented by the evidence that the parties have offered. If the plaintiffs were simply vendors of these goods to the defendant then no question could arise whether or not there was any foundation for the statements contained in paragraph 11 of the defendant's written statement. If they were vendors they were entitled to buy at any price and sell to the defendant at any price they chose to fix. So much for the case as presented to my mind from the pleadings.

Now looking at the indent itself I find that it is addressed to Messrs. Beier & Co., Lyons, and runs as follows:—"We (I) hereby request and authorise you to order, and, if possible, buy and send us (me) the undermentioned goods on our (my) account and risk, etc." This seems to me to be an order for goods on behalf of the defendant. There are certain other clauses and sentences which are immaterial to this issue. Then again I notice that below the printed form of the indent, the defendant has given his order, which is as follows:—"10 cases each containing 10 pieces of 25/30 yards plain velvet 38087—18 inches at 2/4 per yard, nett free godown including duty. 60 days. 6 per cent. interest after due date." The rate quoted here is now relied on as the price fixed between the vendor and purchaser. After this we have a very curious provision under which the defendant in

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case of failure authorises plaintiffs "to dispose of the goods on his account and risk either by private sale or public auction, when and where and how you consider advisable and without any reference to me and I hereby engage to make good to you any loss or deficiency which may arise from such a sale or sales and all expenses together with 5 per cent. commission and interest at 9 per cent. per annum. I waiving my claim to profit on the goods should there be any." A provision of this kind is not what we expect on behalf of the vendor. Between vendor and vendee the former would recover the difference between the market rate and the contract rate. It is further provided "if through failure of manufactures, of strikes or accidents of whatever nature, the goods or any portion thereof are not shipped or delivered at the stipulated time, . . . I shall not be entitled to claim any damages." Then again there is a stipulation, that "This agreement is to be deemed and construed as a separate contract in respect of each instalment of goods and the rights and liabilities of the *sellers* and *buyers* respectively shall be the same as though a separate contract had been made out and signed in respect of each instalment."

The expression "sellers and buyers" used in this clause would at first sight appear to refer to plaintiffs and defendant but when you read the indent carefully, I think there can be no doubt that it does not relate to plaintiffs and defendant, because in that case we would expect that the words "you and us" or "you and we" would have been used but not the words "sellers and buyers." Mr. Jardine has, however, not relied on this clause, it is a very obscure one, it is not therefore necessary for me to discuss it any further.

In coming to a conclusion in this case, I rely on the case of *Mahomedally Ebrahim Pirkhan v. Schiller Dosogne and Co.*⁽¹⁾. This case is for all practical purposes the same as the present case. The more you read the indent in *Schiller's case*, the more striking is the resemblance. It is obviously binding on me. I must hold therefore that the indent in this case has not created a relationship between the parties of vendor and purchaser but of "principal and agents." It is clear from the cases of *Armstrong*

(1) (1889) 13 Bom. 470.

v. *Stokes*⁽¹⁾ and *Robinson v. Mollett*⁽²⁾ that the law which is embodied in the sections of the Indian Contract Act originated from mercantile practice for it was found impossible to create a privity of contract between the foreign indenter and the manufacturer of each firm of silk or velvet as the case might be. The manufacturer at Birmingham who sends his goods to a London firm who have contracted with a person in the United Kingdom or out in India cannot be considered as contracting with the indenter. Lord Blackburn in *Robinson v. Mollett*⁽²⁾ has held, that although there may be no privity of contract between the manufacturer and the person abroad to whom the manufacturer has sent goods through an agent still it is perfectly consistent to hold that the relationship between the agent and indenter is that of a principal and agent. Therefore it seems to me to follow from *Ireland v. Livingston*⁽³⁾ and *Cassaboglou v. Gibb*⁽⁴⁾ that if once you establish the relationship of principal and agent, the ordinary incident of that relationship must follow of which one is that the agent must account for any profits he makes out of his agency unknown to the principal. It may be that the plaintiffs have made no profits whatever, but if the relationship of principal and agent exists, then the defendant is entitled to inspection of the documents in support of his allegation in paragraph 11 of his written statement. He is entitled to see all the documents.

I find on the issue, that the relationship between the plaintiffs and the defendant was that of principal and agent respectively.

The plaintiffs appealed and the defendant filed cross-objections.

On appeal, the preliminary objection was taken, that the lower Court had erred in excluding evidence, as to the usage of trade in Bombay, with reference to the liability to account of a merchant, through whom goods are ordered at a fixed price nett free godown, and no remuneration is mentioned.

By an order, dated the 7th March 1904, the suit was referred back to the lower Court in order that evidence might be taken on the following issues :—

1. Whether according to the custom of trade in Bombay when a merchant in Bombay requests or authorizes a firm to order and to buy and send goods to

(1) (1872) L. R. 7 Q. B. 598.

(3) (1871) L. R. 5 H. L. 395.

(2) (1874) L. R. 7 H. L. 802, at p. 810.

(4) (1883) 11 Q. B. D. 797.

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him from Europe at a fixed price nett free godown including duty or free Bombay harbour and no rate of remuneration is specifically mentioned, the firm is or is not bound to account for the price at which the goods were sold to the firm by the manufacturer ?

2. If this be answered in the negative does it make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant ?

3. If the first issue be answered in the negative then at the dates of the several indents in this suit was the defendant aware of such custom ?

4. Apart from any general custom of trade what in relation to transactions of the character indicated in the first issue has been the usage (a) between the plaintiffs and the defendant and (b) between Messrs. Beier and Katz and the defendant ?

On the 8th of July 1904, the following judgment was delivered by

RUSSELL, J. :—This matter has been referred to me by the Appeal Courts' Order under section 566 of the Code and, having heard the evidence on both sides at great length, I propose to record my findings on the issues.

On the one hand, namely on behalf of the plaintiffs, we have had representations of all the most influential firms in Bombay together with two large dealers and Mr. Robertson was anxious to call about 30 more witnesses but I stopped him.

On the other hand, the defendant called no representatives of firms but dealers only who of course would be very glad to have this alleged custom broken down.

Now the plaintiffs' evidence I find is all one way and I confess that after many years' experience in Bombay it was difficult for me to imagine that any evidence would be brought to contradict this alleged custom.

One has only to regard the course of business to shew that it is impossible to conceive that the dealers should have the right to call upon the home firms or their Bombay representatives to render an account of any profits made on purchases of goods.

The indent is an offer by the dealer in Bombay at a fixed price. His offer is wired home. The home firm after communication with the makers or in any other way they can put their hand upon the goods. The price is to include costs, freight and insurance and everything down to the time that the goods arrive

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in Bombay harbour. Then if the home people accept the offer made, they wire the acceptance to their representatives here and from that moment a price is fixed as between the parties and therefore it seems to me that it is incredible that when two persons have fixed the price in this way, the dealer should be entitled to any rebate if the home people can get the goods at a less price from the manufacturer and when you come to think of it, it stands to reason. A private person in Bombay orders out from a shop certain articles and is willing to pay a certain fixed price for those articles. It is impossible to believe that he could call upon the shop to account for any profit made as between the purchasing and selling price. No instance has been given of any dealer calling upon a firm in Bombay for an account and all the witnesses are unanimous in saying that if such an account were called for, they should refuse to give it. Of course it must be borne in mind that indents are drawn up in different forms and during the examination of Sorabji M. Shah, it was stated that his firm acting on the advice of their attorneys Messrs. Craigie, Lynch and Owen altered the form of their former indents so as to meet this very point. It may, therefore, be desirable for the mercantile community of Bombay to consider whether it would not be for their advantage to put a point such as has been raised in the present case beyond all dispute by altering their indents in the way Sorabji M. Shah's firm altered theirs under legal advice.

This custom is in accordance with part of the opinion expressed by Blackburn, J., in *Ireland v. Livingston* ⁽¹⁾ and I do not find anything in *Robinson v. Mollett* ⁽²⁾ to militate against it.

I find on Issue No. 1 that under the circumstances mentioned therein the firm is not bound to account for the profits as therein mentioned.

On Issue No. 2 I find it makes no difference if the firm receives commission or trade discount as suggested.

On Issue No. 3 I find the defendant was perfectly aware of the custom.

On Issue No. 4 you have only to look at the indent itself to see that the relation as between Beier and Katz, and the defend-

(1) (1871) L. R. 5 H. L. 395.

(2) (1874) L. R. 7 H. L. 802.

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ant was buyer and seller and not principal and agent. There are other clauses in the indent which bear out the same terms, but it is not necessary for me to refer to the indent at length.

This was the opinion I had at first formed in this case but I conceived that the case of *Mahomedally Ebrahim Pirkhan v. Schiller Dosogne & Co.*⁽¹⁾ compelled me to hold the contrary. I understand from counsel, that the case was differentiated from the present one in the court of appeal in a way in which it was not differentiated before me.

Inverarity with *Robertson* and *Jardine* for the appellants (plaintiffs):—The written part of the indent is in variance with the printed parts. Therefore the printed clauses which are in direct variance go out, see *Dudgeon v. Pembroke*⁽²⁾ *Ex parte Miles. In re Isaacs*⁽³⁾. The court will look at the transaction, and not regard what the parties call themselves, *Ex parte White. In re Nevill*⁽⁴⁾. We say the plaintiffs received an offer from the dealers for delivery free ex godown. Therefore the relation between the parties was that of vendor and purchaser, not principal and agent. No commission was given by the dealer in Bombay, nor did the plaintiff receive commission from the makers at home, except in certain rare cases. It is well known, that the persons who take these offers, take the indent price and make what profit they can. There is nothing secret about such profits. It follows, that even if the relation between the parties was that of principal and agent, the agent was entitled to the difference between the indent price and the cost price. We rely on the custom in Bombay, that the indent price is a fixed price and that persons who take such orders are not bound to render an account.

The case of *Mahomedally Ebrahim Pirkhan v. Schiller Dosogne & Co.*⁽¹⁾ does not apply; on the other hand, see *Great Western Insurance Co. v. Cunliffe*⁽⁵⁾ and *Baring v. Stanton*⁽⁶⁾.

Strangman and *Setalvad* for the respondent (defendant):—Custom is expressly excluded by the indent, therefore it cannot be relied on in the present case.

(1) (1889) 13 Bom. 470.

(2) (1877) 2 App. Cas. 284.

(3) (1885) 15 Q. B. D. 39 at p. 42.

(4) (1870) L. R. 6 Ch. 397 at p. 399.

(5) (1874) L. R. 9 Ch. 525 at p. 536.

(6) (1876) 3 Ch. D. 502.

[JENKINS, C. J.—What, having regard to contracts of this kind, which are ambiguous, are the obligations of the parties ?]

The contract in question is more consistent with agency than with sale; therefore the onus is on the plaintiffs to prove terms inconsistent with agency. The relationship between the defendant and Messrs. Beier & Co. was the same as that which formerly existed between the defendant and Messrs. Beier and Katz. In 1895 Messrs. Beier and Katz wrote "the maker refuses to listen to your offer" and "the maker refuses selling at your limit". Similarly in January 1901 the plaintiffs wrote "assortment and border charged as per note have been placed" and in July 1901 "12 cases plain velvet have been placed." These expressions are only consistent with a relation of principal and agent.

The plaintiffs now allege a custom, that they are entitled, not only to the commission or discount allowed by the manufacturer, but also to the difference in price. No such custom is in fact proved. The merchants who gave evidence used vague expressions. Not one of them spoke of instances, where both the difference in price, and also commission were taken. But a usage of trade must be proved by instances and not by mere expressions of opinion, see *Cunningham v. Fonblanque*⁽¹⁾, *Mackenzie v. Dunlop*⁽²⁾, *Rahimabai v. Hirbai*⁽³⁾, *Gopal Narhar Safray v. Hanmant Ganesh Safray*⁽⁴⁾. The custom set up by the plaintiff is not of a universal nature, therefore, to bind the defendant, it was necessary to prove that he was aware of it, see *Robinson v. Mollett*⁽⁵⁾. We contend further, that even if the custom exists, it is bad, because it is not consistent with law, see *Meyer v. Dresser*⁽⁶⁾, *Turnbull v. Garden*⁽⁷⁾, *Kimber v. Barber*⁽⁸⁾, *Thompson v. Meade*⁽⁹⁾, and lastly we say, that it is not admissible in any event, because it is repugnant to and inconsistent with the express terms of the contract, see the Indian Evidence Act ⁽¹⁰⁾ and the judgment of Farran, J., in *J. G. Smith v. Ludha Ghella Damodar*⁽¹¹⁾.

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(1) (1833) 6 C. & P. 44 at p. 47.

(2) (1856) 3 Macq. H. L. Cas. 22 at pp. 26, 27, 40.

(3) (1877) 3 Bom. 34.

(4) (1879) 3 Bom. 273 at p. 297.

(5) (1874) L. R. 7 H. L. 802.

(6) (1864) 16 C. B. N. S. 646.

(7) (1868) 38 L. J. (Ch.) 331 at p. 334.

(8) (1872) L. R. 8 Ch. 56.

(9) (1891) 7 T. L. R. 698.

(10) Section 92, proviso 5.

(11) (1892) 17 Bom. 129 at p. 143.

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[JENKINS, C. J.—We expressed a strong view before, that “buyers and sellers,” in clause 11, referred to the indent.]

That would be an end of the case. We contend that the difference between the opening words of the indent, and those of a ready goods contract, clearly shows, that the relation between the parties was that of principal and agent.

JENKINS, C. J.—The plaintiffs, who carry on business in partnership in Bombay and at Lyons, sue to recover Rs. 4,724 as the balance due to them in respect of goods alleged to have been delivered by them to the defendant under four indents numbered 109, 134, 218, 318.

These goods were procured by the plaintiffs from Europe at the defendant's instance. The plaintiffs contend that they are entitled to charge the defendant for the goods the rates mentioned in the indents, irrespective of the price paid to the manufacturers: the defendant, on the other hand, maintains that those rates are merely limits, and the plaintiffs cannot charge as the purchase price of the goods more than the manufacturers were paid.

These indents, though four in number, are substantially in identical terms; each is on a printed document, to which written matter has been added to meet the exigencies of the particular case.

To the claim in respect of two of these indents an objection is made on the score of the time, at which they were sent; but it will be more convenient first to consider the general question apart from this particular objection, and so I will select for discussion an indent No. 318, not obnoxious to it. It is dated the 15th June 1901; it is headed with the name of Messrs. Beier and Co., that being the name or style, under which the plaintiffs then carried on business in Lyons and Bombay; it is addressed to that firm at Lyons; and it is signed by the defendant.

It will be noticed that, apart from a few lines at the end, the whole of the document is on a printed form, and it is common ground that the form was supplied by the plaintiffs, and is one commonly used by them in business of this class.

By it the defendant purports to request and authorise the plaintiffs to order, and, if possible, buy and send the defendant the undermentioned goods on the account and risk of the defendant, who binds himself to pay for the same at the prices and conditions specified below: the invoice amount, including European charges are to be drawn on the defendant: the goods are to be landed by the defendant, who will pay import duty: it is to be optional for the plaintiffs to execute the whole or any part of the order: in the events therein specified the plaintiffs are not to be liable for damages though they may have advised the defendant of *having placed the order or any portion thereof*: the "agreement is to be deemed and construed as a separate contract in respect of each instalment of goods and the rights and liabilities of the *sellers and buyers* respectively shall be the same as though a separate contract had been made out and signed in respect of each instalment: insurance is to be effected in Europe and the plaintiffs are to be free of all responsibilities regarding it: and anything written on the Indent Form by the *buyers* in any language other than English except their signature shall be null and void.

Then there are added in writing the following words:—

"12 cases ea/. contg. 18 Pcs. of 25/30 yds. Plain Velvet 1421-18 at 1s. 9d. per yd. nett free godown including duty. 60 days 6 per cent. Int. after due date.

Assortment by next mail.

Shipment in 4 lots:—1st 10/12 weeks from acceptance or earlier if possible and out of remaining each to follow every month.

Quality and silk border to be exact as supplied in c/s. 2218 1090 Ind.

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There is, it will be seen, an inconsistency between the printed and the written provisions; but this is no uncommon occurrence in the documents of business men, and we have in the decided cases guidance as to how it should be handled.

In *Gumm v. Tyrie*⁽¹⁾ Blackburn, J., said: "I do not agree with the proposition that Mr. Lush puts his case upon, that the words so printed are to be treated less as part of the contract than the other words, because they are printed. I think where

(1) (1864) 33 L. J. (Q. B.) 97 at p. 111.

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there are mere formal and general words which are always put into contracts and are customary terms, and there are other special and peculiar words, I think when one is to overpower the other and to have most weight, that probably we should say that the special terms which a man has invented for himself and put into the contract, have been more considered and more thought of than those merely ordinary words, and no doubt these printed forms are customary, and, consequently the written terms would be more considered by him; and if they conflict and cannot be reconciled, then the written terms, those more special terms thought of by himself, may be considered to be more thought of, and, consequently, to have more weight by him."

We cannot therefore discard the print, but must as far as possible discover the real contract of the parties from the printed as well as from the written words.

For the defendant it is argued that the legal relation constituted by this document is that of principal and agent, with the incidents (including the agent's liability to account) which that relation ordinarily involves.

The plaintiffs, on the other hand, maintain that the contract is one of purchase and sale, so that no liability to account can arise: and alternatively they contend that, if the contract is one of agency, they are by the custom of trade under no obligation to account.

It appears to me that the method of approaching the case, which these rival contentions invite, is unsatisfactory: each is based on too superficial a view of the position; the case is (in my opinion) not one to be decided by an attempt to bring the contract within the one or the other of the two categories of sale or agency; the provisions of the document are equivocal, some lean towards the one relation, some towards the other.

Therefore we must examine the document as a whole and in its several parts, and also the surrounding circumstances, for thus only (as it appears to me) can it be determined whether or not an obligation to account exists.

To place the Court in full possession of these surrounding circumstances the plaintiffs proposed to lead evidence in order to show that according to commercial usage in Bombay, when

business was done on indents like the present, accounts were never given, as the profits were the importer's remuneration, and that this has been repeatedly recognized even by the defendant.

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Mr. Justice Russell however declined to allow this evidence. Objection was taken to this ruling when this appeal first came before us and we held this decision was wrong.

The indent admittedly made no provision in express terms for the remuneration of the plaintiffs: it could not be supposed that they were to engage in trade without any profit to themselves: and (even in the learned Judge's view of the relations between the parties) in the absence of a special contract the allowance and custom of trade is the only medium to ascertain what is due: *Roberts v. Jackson*⁽¹⁾.

Moreover it appeared to us that a matter of general and far-reaching importance to the commercial community was involved, and as an appeal was made to the usage of trade, we thought it desirable that the Court should be placed in a position to determine whether the alleged custom existed, and, if so, what was its bearing on the present litigation.

Accordingly in the light of what had been decided in *Robinson v. Mollett*⁽²⁾, *Bourne v. Galliff*⁽³⁾, *Cumming v. Shrand*⁽⁴⁾ and *Rowcliffe v. Leigh*⁽⁵⁾ we framed issues which we sent back to the first Court that evidence might be recorded thereon. The issues were in these terms:

"1. Whether according to the custom of trade in Bombay when a merchant in Bombay requests or authorises a firm to order and to buy and send goods to him from Europe at a fixed price nett free godown including duty or free Bombay Harbour and no rate of remuneration is specifically mentioned the firm is or is not bound to account for the price at which the goods were sold to the firm by the manufacturer?

2. If the first issue is answered in the negative does it make any difference that the firm receives commission or trade-discount from the manufacturer either with or without the knowledge of the merchant?

3. If the first issue be answered in the negative then at the dates of the several indents in suit was the defendant aware of such custom?

(1) (1817) 2 Stark 225.

(2) (1875) L. R. 7 H. L. 802.

(3) (1844) 11 Cl. & F. 45.

(4) (1860) 29 L. J. (Ex.) 129.

(5) (1877) 6 Ch. D. 256.

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4. Apart from any general custom of trade what in relation to transactions of the character indicated in the 1st issue has been the usage (a) between the plaintiffs and the defendant (b) between Messrs. Beier & Katz and the defendant? "

Evidence has now been recorded, and returned to us by Mr. Justice Russell, who has given us the benefit of his opinion as to its value and effect.

When eighteen witnesses had been examined by the plaintiffs, the learned Judge intervened and expressed the opinion that it was not necessary for the plaintiffs to call any further evidence, though Mr. Robertson, who appeared for the plaintiffs, intimated that he had 30 more witnesses to call in support of the custom.

The defendant too on his side called many witnesses.

The majority of the witnesses called by the plaintiffs are the representatives of large importing firms in Bombay, and most of them actually do business on indents practically undistinguishable from that with which I am now dealing.

All these witnesses are agreed that in the circumstances indicated in the 1st issue the firm is not bound to account for the price at which the goods are sold to the firm by the manufacturer.

It is unnecessary to discuss the evidence of each one in detail: it will suffice to examine the evidence of the first of these witnesses, Mr. Abercrombie, who is fairly typical of the majority that follow.

He represents Messrs. Latham Abercrombie and Co., and has been Chairman of the Chamber of Commerce. He has had 30 years experience in Bombay: his firm has been taking indents in Bombay, the terms being free Bombay Harbour, free ex godown, and c. f. i. c. i., for the last 10 or 15 years. When the price is fixed in the indent the firm, he says, is not liable to account for the price paid to the maker: they have never accounted to the indenter, and he has never demanded it: if he did they would not give it: when the price is fixed they get nothing from the indenter except the fixed price: it makes no difference whether the firm receives commission or trade discount from the maker either with or without the knowledge of the indenter: he believes it to be the custom in Bombay: his firm gets their profit in the

price : the price to the indenter covers every single thing till the goods arrive in Bombay : the dealers knew they got their profits in this way : the home firm can decline the indent or not : the home firm accepts the indents : if they miscalculate they are still bound by the indent if they have accepted it.

Mr. Abercrombie was cross-examined, but his evidence was in no way shaken, and what he has said is borne out by the plaintiffs' other witnesses.

Of these other witnesses 3 or 4 are no doubt the representatives of firms, who import on documents distinguishable from those in suit.

From among these I will take Mr. Armstrong, the present Chairman of the Chamber of Commerce, whose evidence affords a sample of what the other witnesses of this class say. He is a partner in Lyon and Co. and has been 20 years in Bombay : his firm brings out goods free Bombay Harbour, and c. f. i. c. i. and sometimes free ex godown.

In reference to the 1st issue he says he would not account for the price, and that it makes no difference whether the firm receives commission from the maker with or without the indenter's knowledge. He deposes that they have never accounted for the price, and an account has never been demanded ; that after they have accepted the indent they were principals and of course should carry out their contract ; and that after acceptance it becomes a sale.

Mr. Armstrong was subsequently called by the defendant as a witness, and it then appeared that the indent was not the only document employed by his firm, but on acceptance a sub-contract form is employed and the transaction becomes an absolute sale from Lyon and Co., Bombay, to the indenter.

It thus appears that Mr. Armstrong's firm, with more regard for actual facts than is according to the evidence generally observed, uses documents, which give accurate expression to the transaction in its several stages. To this extent this evidence is not of the same value to the plaintiffs, and this remark applies also to the evidence of Mr. Barraclough and Mr. Gillum, though each of them, as gentlemen engaged in business in Bombay, would answer the first two issues in the plaintiffs' favour.

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In addition to the evidence given by the representatives of firms, there is that of Mr. Wadia, a salesman of 42 years experience, Yamin Turki, a dealer, Mr. Gordhandas Khimji, a piece-goods merchant in a large way, Mr. M. N. Gazdar, who is in the plaintiffs' employ, and Mr. Jackli, one of the plaintiffs, all of whom support the plaintiffs' view.

While Mr. Sorabji M. Shah, who was called by the defendant, says, "the indents give the prices. The goods are to be ordered out (*sic*) a certain price. I think it may not be fair but the firm must take the profit in answer to issue I."

Other witnesses called by the defendant would answer the 1st issue in the negative, though it obviously detracts from the value of their evidence that in no single instance has it been shown or even suggested that an account has been rendered.

It is true that by some it was stated that an account has been demanded, and that the demand has been met by demonstration that there had been no profits; but these statements have been supported in no instance by documentary evidence or by the testimony of any one from whom a demand is alleged to have been made. This (in my opinion) largely discounts the worth of this evidence.

But the defendant does not rest his opposition to the plaintiffs' claim on this alone; he relies on other circumstances, which he urges are in his favour. Thus he points to Exhibits Reference 8 and 9 as implying that when he dealt through Beier and Katz—and I may here remark parenthetically it is common ground that business with that firm was conducted on precisely the same lines as with their successors, the plaintiffs—he was brought into direct relation with the maker, and in support of this he points to the statement "the maker refuses to listen to your offer" in the first of these letters; and "the maker refuses selling at your limit which is too much below costs" in the second.

Neither of these statements was put to Mr. Jackli in cross-examination either at the first or the subsequent hearing.

It has been suggested before us that these letters must have been a very recent discovery. But taking them for what they

are worth, it is to be noticed that they were written as far back as 1895, and stand alone.

But apart from that, do they really support the suggestion in aid of which they are read?

It cannot be pretended that either statement is literally correct: the defendant's offer, it may be assumed, was free Bombay Harbour, or on equivalent terms; but manifestly and admittedly no offer on that basis would be made to the maker. I think these statements mean no more than that the terms on which the maker is willing to sell would not allow of the firm's accepting the indent, and this is all that was intended to be communicated.

I cannot regard either statement as showing that direct relations were established between the indenter and the maker; each is just one of those elliptical phrases, which, read literally, is based on a fiction that deceives no one.

Then stress has been laid on the advice notes (Exhibits Reference 2 and 3) in which a reduction in price was made.

But the reduction was not made after acceptance; it merely was that the firm said it could do the particular business on more favourable terms than the indenter had proposed.

It has been urged this could not be so, because, it is said, "you do not find generosity in business"; but the fact remains despite this notional maxim of commercial life.

The truth is, as Mr. Armstrong pithily remarks, "sometimes accepting at a less price doubles the order. It is a matter of policy."

Then much is made of the fact that in some cases invoices have been sent direct to the indenter, but in none of the instances specified has the fact been of value, because in them the indent has been addressed direct to the home firm.

Taking the whole of the evidence into consideration the conclusion to which I come is that, according to the custom of trade in Bombay, when a merchant requests or authorizes a firm to order and to buy and send goods to him from Europe at a fixed price nett, free godown including duty, or free Bombay

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Harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer.

I further hold that it does not make any difference that the firm receives commission or trade discount from the manufacturer either with or without the knowledge of the merchant.

That the defendant knew of this custom there is in my opinion no doubt.

Though he has had dealings for a considerable period with the plaintiffs and their predecessors, he never has asked for an account, and he is not able to point to or even suggest, any instance when an account has been furnished either to himself or any other dealer.

And yet he must have known that profits were made: he cannot have supposed that firms worked for no profit: and it obviously is no answer to say that it never came to his knowledge in any particular transaction that a profit was made by the difference of prices. He never chose to find out, because his rights were satisfied when he got the goods at the indent price.

The defendant's version that he was told the plaintiffs' only profits were a five per cent. commission from the manufacturers is one I do not credit: it is emphatically denied by the plaintiffs, and is in my opinion highly improbable.

But then it has been ingeniously argued by Mr. Strangman that we cannot have regard to the custom proved, because thereby an incident would be annexed "repugnant to, or inconsistent with, the express terms of the contract" (section 92, proviso 5 of the Evidence Act).

But there is a fallacy underlying this: the incident is clearly not repugnant to or inconsistent with any *express* term of the contract. There is no *express* term that accounts shall be rendered: it can only be claimed that the obligation exists by implying, or importing into the contract an incident of the relations between a principal and his agent.

Moreover the argument assumes that the contract between the parties was that of agency.

I have already said that on this point the express terms of the Indent are equivocal, and it is interesting to trace how in practice these transactions are carried to completion.

In the case of Messrs. Lyon and Co.'s dealings there are two distinct phases of the transaction, each marked by a separate document.

First, there is the indent pure and simple, and then the contract of sale between the firm and the dealer ; so that the transaction begins with a request or authority, on the basis of which the firm enters on negotiation with the European house with a view to learning whether the dealer's proposals are feasible, and when this is ascertained in the affirmative the contract for sale is made. No doubt the course of dealing in their case is in accord with the documents passed, but I gather that this is so because this particular firm is careful to see that their documents are in agreement with the course of trade.

So again Mr. Abercrombie states, that the firm is bound to deliver if they accept the indent, and this view is to be found running through the evidence of the other witnesses called by the plaintiffs.

Even as between the parties to this suit we find goods supplied under the indents described as *bought* of Beier and Co. (see Ex. A, A1).

In the view however that I take of the case it is not necessary, nor is it desirable that we should decide whether on the acceptance of the indent the relations of the parties became crystallized into those of vendors and purchasers pure and simple, for apart from that, I hold that on the terms of the indent viewed in the light of the custom of trade in Bombay the plaintiffs are under no obligation to account.

So far I have dealt only with indent No. 318 : it has not been suggested that the others can be differentiated from it except that some of them were earlier in date than the 1st of January 1901.

The firm of Beier and Co. dates from the 1st of January 1901. Prior to that the plaintiff Paul Beier had traded in partnership with a Mr. Katz under the name style and firm of Beier and Katz. The defendant contends that the indents prior to the 1st of

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January 1901 were with Messrs. Beier and Katz, and that this suit cannot be maintained by the present plaintiffs. This objection has no substance in it. Not only was it arranged between Beier and Katz prior to the date of these indents that no obligations should be taken to be performed after the 1st of January 1901, the defendant with full knowledge of the dissolution accepted delivery of goods under the indents from the plaintiffs in whom the property in the goods was vested.

Under the circumstances, I am of opinion that the defendant cannot successfully contend that the present plaintiffs cannot sue.

Mr. Justice Russell has directed by his decree that the Prothonotary should forward the plaint and other document to Mr. Katz at Lyons at the plaintiffs' expense and has given Mr. Katz liberty to intervene in the suit.

The direction was given against the will of the plaintiffs and the defendant has not attempted to support it.

When the case was before us prior to remand, we determined that this order must be set aside.

The result is that there will be a decree for Rs. 4,724 (the sum agreed by the parties) with interest at 6 per cent. to the date of the decree.

The plaintiffs must get all their costs of the suit including reserved costs, but in respect of the costs of the summons of the 17th day of March 1903 we cannot direct them to be taxed on the footing of the summons being certified as fit for the employment of counsel. The decretal amount will bear interest at 6 per cent.

Appeal allowed.

Attorneys for appellants:—*Messrs. Eicknell, Merwanji and Motilal.*

Attorney for respondent:—*Mr. K. D. Shroff.*

A. H. S. A.

ORIGINAL CIVIL,

*Before Mr. Justice Chandavarkar.*CULLIANJI SANGJIBHOY, PLAINTIFF, v. RAGHOWJI VIJPAL
AND OTHERS, DEFENDANTS.*

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LAKSHMIBAI, PLAINTIFF, v. CULLIANJI SANGJIBHOY, DEFENDANT.†

Costs—Solicitor's lien for costs—Summary jurisdiction of Court over Suitors—Compromise by parties without knowledge of Solicitor—Solicitor's right to oppose motion—Negotiable Security—Transfer of negotiable security by debtor to his creditor—Effect.

By a private compromise between Cullianji the plaintiff, in the first suit, and Lakshmibai, the 6th defendant, who was also the plaintiff in the second suit, it was agreed that the plaintiff should give to Lakshmibai certain immoveable property and Rs. 15,853 in full settlement of her claim and a further sum of Rs. 500 for her solicitor's costs.

On the 21st February 1904, possession of the immoveable property was given and a sum of Rs. 500 paid to Lakshmibai. Cullianji also gave to her 3 hundis for Rs. 5,000, Rs. 5,000 and Rs. 5,853 respectively, but the hundis were dishonoured on their due dates.

In March and April 1904, the plaintiff paid 2 sums of Rs. 5,000 to Lakshmibai, by cheque, in lieu of the 2 hundis for Rs. 5,000.

On the 4th June 1904, Lakshmibai's Solicitor gave notice to the plaintiff, that he had a lien for costs on the sum of Rs. 15,853 agreed to be paid by the plaintiff to his client.

On the 22nd of June 1904, the plaintiff paid the sum of Rs. 5,853 to Lakshmibai, in cash, in respect of the hundi for Rs. 5,853, which was dishonoured.

The plaintiff, thereupon, moved for an order, authorizing the delivery to him of certain property, alleging that he had settled and satisfied the claims of Lakshmibai. Lakshmibai's Solicitor opposed the motion on the ground that the settlement and satisfaction were collusive transactions intended to cheat him out of his costs and asked the Court to order the plaintiff to deposit the sum of Rs. 9,000 as security for the same.

Held, that in the absence of fraud or collusion between the parties, the Solicitor was entitled to be paid his taxed costs, by the plaintiff, up to Rs. 5,853, being the amount paid by the plaintiff after notice of the lien.

The High Court of Bombay has a summary jurisdiction over its suitors for the purpose of enforcing a Solicitor's lien for costs: and in enforcing it the Court must be guided by the principles of English law.

Whether the Solicitor moves the Court by an application of his own or appears to oppose a motion of the party against whom the lien for costs is alleged to arise, in either case he calls in aid the equitable interference of the Court under its summary jurisdiction.

* Suit No. 545 of 1891.

† Suit No. 625 of 1903.

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Devkabei v. Jefferson, Bhaishankar and Dinsha⁽¹⁾ and *Khetter Kristo Mitter v. Kally Prosunno Ghose*⁽²⁾, followed; *Ramdoyal Serowgie v. Ramdeo*⁽³⁾ dissented from.

Held, also, that the giving of a negotiable security by the plaintiff to Lakshmibai operated as a conditional payment only and not as a satisfaction of the debt.

In re Romer and Haslam⁽⁴⁾, followed.

THE facts of this case are as follows:—In 1891, Cullianji, the plaintiff, filed a suit (No. 545 of 1891), against the defendants, including Lakshmibai, his adoptive mother, to establish his rights as the adopted son of Sangjibhai Raisey and to recover the property of the deceased.

The suit was referred to arbitration and ended in an award, dated the 28th July 1895.

On the 15th November 1902, the High Court passed an order restraining Raghovji, the 1st defendant, who was in possession of part of the deceased's estate, from delivering possession of the same to the plaintiff, until further order.

On the 9th January 1903, the Court passed a decree in terms of the award and referred the suit to the Commissioner for taking accounts.

This reference was due to the contention of Lakshmibai, that the plaintiff had failed to carry out the terms of the award in her own and her daughter's favour.

In 1903, Lakshmibai filed a suit (No. 625 of 1903) against the plaintiff.

On the 5th February 1904, a compromise was arranged between the parties. By it, Cullianji agreed to give to Lakshmibai certain immoveable properties situated at Cutch and a sum of Rs. 15,853 in settlement of her claim and a further sum of Rs. 500 for her Solicitor's costs in both suits.

On the 21st February 1904, possession of the immoveable properties was given to Lakshmibai and a sum of Rs. 500 was paid to her. Three hundis for Rs. 5,000, Rs. 5,000 and Rs. 5,853 respectively were also given to Lakshmibai, but the same were not honoured on their due dates.

In March and April 1904, the plaintiff paid 2 sums of Rs. 5,000 to Lakshmibai, by cheque, in lieu of the 2 hundis for Rs. 5,000.

(1) (1886) 10 Bom. 248.

(2) (1898) 25 Cal. 887.

(3) (1899) 27 Cal. 209.

(4) [1893] 2 Q. B. 286 at p. 286.

On the 4th June 1904, Mr. Hiralal Dayabhai, Lakshmibai's Solicitor, gave notice to the plaintiff, that he had a lien for costs on the sum of Rs. 15,853 agreed to be paid by the plaintiff to his client.

On the 22nd June 1904, the plaintiff paid the sum of Rs. 5,853 in cash to Lakshmibai in respect of the hundi for Rs. 5,853, which was dishonoured.

On the 27th July 1904, the plaintiff moved the Court for an order, discharging the order made on the 15th November 1902 and authorizing Raghowji, the 1st defendant, to hand over to the plaintiff the estate of the deceased.

Mr. Hiralal Dayabhai appeared by counsel to oppose the motion on behalf of Lakshmibai and on his own behalf.

Lowndes, for plaintiff and defendant 1:—We contend that the plaintiff, having satisfied the claims of his adoptive mother in both suits, is entitled to have delivery of the property.

The 1st defendant is an old man and he desires to be released from the case and management of the property, in order that he may retire to his native country.

Even assuming that Lakshmibai's Solicitor has the lien, which he alleges, he has no *locus standi* in the present motion, for the property, of which possession is sought, is admittedly the plaintiff's: see *Ramdoyal Serowgie v. Ramdeo*.⁽¹⁾

In the absence of fraud or collusion between the parties, which is denied, the only claim, which the Solicitor could have against the plaintiff, would be in respect of the Rs. 5,853, paid on June 22nd, after notice of the lien. But the payment of Rs. 5,853 was not a payment under the compromise between the parties, but in extinction of an independent liability, arising under the hundi; and the hundi was given to Lakshmibai, before notice of the lien.

The Solicitor has not however the lien, which he alleges, for the only lien, which an attorney can claim in India, is that expressly conferred by sections 217 and 221 of the Indian Contract Act.

Setalvad for defendant 6 and her attorney:—The compromise between the plaintiff and the 6th defendant Lakshmibai was a

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fraudulent and collusive settlement, intended to cheat Mr. Hiralal Dayabhai out of his costs. The High Court has a summary jurisdiction over its suitors and a Solicitor has a right to ask the Court to give effect to his lien for costs, before any order is passed, see *Devkabi v. Jafferson*⁽¹⁾ and *Khetter Kristo Mitter v. Kally Prasunno Ghose*.⁽²⁾

We ask, that the plaintiff may be ordered to deposit the sum of Rs. 9,000, as security for the costs incurred by Lakshmibai in both suits.

Weldon for defendant 8.

CHANDAVARKAR, J.—These are two motions, one arising out of suit No. 545 of 1891, and the other out of suit No. 625 of 1903.

The former suit was brought by Cullianji Sangjibhai as the adopted son of Sangjibhai Raisey, deceased, to establish his right as such adopted son and recover the property of the deceased. The defendants were the executors of the will of the deceased, his two widows Lakshmibai and Raliatbai, and his mother Tejbai.

The suit was referred to arbitration which ended in an award, dated the 28th July 1895.

On the 15th of November 1902, this Court passed an order restraining the 1st defendant, Raghowji, who held possession of the estate of the deceased's firm in Bombay, from delivering and the plaintiff, Cullianji, from receiving possession of the same until further order of the Court.

The suit came on for hearing on the 9th of January 1903 when the Court passed a decree in terms of the award and referred the suit to the Commissioner for taking accounts to ascertain what portions of the award had been carried out and what portions, if any, remained to be carried out. This reference was due to the contention of Lakshmibai, the adoptive mother of the plaintiff, who was defendant No. 6 in the suit, that the plaintiff had not carried out the terms of the award in her and her daughter's favour.

In the meantime Lakshmibai filed suit No. 625 of 1903 against her adopted son Cullianji, plaintiff in the other suit.

(1) (1886) 10 Bom. 248.

(2) (1898) 25 Cal. 887.

Cullianji now, by his motion in suit No. 545 of 1891, asks the Court to discharge the order of the 15th of November 1902, because Raghovji, being too old and ill, wishes to retire. Cullianji further states as one ground for his prayer that he has effected a compromise with his adoptive mother, Lakshmibai, in respect of both the suits and that he has satisfied her claims, so that she can have no opposition to offer to the motion.

Mr. Hiralal Dayabhai, a Solicitor of this Court, who appeared as attorney for Lakshmibai in both the suits, appears by counsel, Mr. Setalvad, to oppose the motion on behalf of the said Lakshmibai and also on his own behalf. He asks the Court to compel Cullianji Sangjibhai to deposit Rs. 9,000 as security for his costs incurred in both the suits as Lakshmibai's attorney. The same prayer is made by him in the other motion which arises out of suit No. 625 of 1903 brought by Lakshmibai against the said Cullianji.

The important question I have now to decide relates to Mr. Hiralal Dayabhai's right of lien for his costs as attorney of Lakshmibai in both the suits.

That right is alleged to arise as against Cullianji Sangjibhai, plaintiff in suit No. 545 of 1891 and defendant in suit No. 625 of 1903, under the following circumstances:—Mr. Hiralal acted as Lakshmibai's solicitor in both the suits and incurred costs. But behind his back Cullianji and Lakshmibai effected a compromise and Cullianji pretends to have made payments to Lakshmibai, who again pretends to have received such payments, but the payments are collusive and fraudulent.

The first question raised by Mr. Lowndes, Counsel for Cullianji, is as to the right of Lakshmibai's solicitor to oppose the motion in suit No. 545 of 1891 on the ground of his alleged lien. Assuming, asks Mr. Lowndes, that the solicitor has the lien he claims, what *locus standi* has he to come in and oppose on the basis of that claim the plaintiff's prayer for possession of the property which is admittedly the plaintiff's. I am of opinion, however, that if the Court has a summary jurisdiction of an equitable character over its suitors in respect of the lien of a solicitor for his costs, a solicitor, engaged by a party to a suit, has a right to come in and say that before any order is passed on the

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basis of a compromise arrived at privately between the parties, effect should be given to his lien. Whether the solicitor moves the Court by an application of his own or 'appears to oppose a motion of the party against whom the lien for costs is alleged to arise, in either case he calls in aid the equitable interference of the Court under its summary jurisdiction. Cullianji, plaintiff in suit No. 545 of 1891 and defendant in suit No. 625 of 1903, says that he has settled and satisfied the claims of Lakshmibai in both suits, and on the strength of that he asks the Court to discharge the order of the 15th of November 1902. Lakshmibai's solicitor replies that the settlement and the satisfaction are collusive transactions intended to cheat him out of costs incurred by him for his client. I think that the solicitor has a right to be heard on the motion in suit No. 545 of 1891 as upon his own motion in suit No. 625 of 1903. The objection raised by Mr. Lowndes is at the best one of mere form and procedure. Under the English Law, quite independently of any statute, I understand that a solicitor had always a lien on property recovered, and that lien, as pointed out by Jessel, M. R., in *Hamer v. Giles*⁽¹⁾, could always have been enforced by an order in the suit. And in substance it is such an order that I am now asked by the solicitor before me to make.

But it is further urged by Mr. Lowndes that such a lien as the solicitor now claims in respect of his costs does not exist by the law. The learned Counsel's argument is that the only lien which a solicitor in this country can claim is that expressly given to him by sections 217 and 221 of the Contract Act, and that the English Law as to a solicitor's special lien for costs upon a fund realized in a cause has no application here. This argument, however, is disposed of by the decision of Sargent, C. J., and Scott, J., in *Devkabai v. Jafferson, Bhaishankar and Dinska*⁽²⁾, where Sargent, C. J., said :—

"It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 and 24 Vic., Cap. 127, by which that lien was very much extended. By that law the solicitor had a lien for his costs on any funds or sum of money recovered for, or which became payable to, his client in the suit — see *Morgan on Costs*."

⁽¹⁾ (1879) 11 Ch. D. 942 at p. 947.

⁽²⁾ (1886) 10 Bom. 248 at p. 253.

This is not a mere dictum ; it forms an essential link in the chain of reasoning upon which the actual decision in the case rests. Further, practically the same view was taken by the present Chief Justice of this Court when he was a Puisne Judge of the Calcutta High Court in his judgment in *Khetter Kristo Mitter v. Kally Prosunno Ghose*⁽¹⁾, where the question was whether an attorney for one of the parties to a suit could invoke the summary jurisdiction of the Court in assertion of his lien on the fund recovered in the suit under a compromise. His Lordship held:—

“It is a claim on the part of the attorney to have secured to him his due reward out of the fruit of his labour, and for that purpose to call in aid the equitable interference of the Court. But while the right is clear, it must be conceded that the litigants themselves are really masters of the suit, and that it is within their power to compromise it without the acquiescence or even the knowledge of their attorneys. The exercise of this right, however, is subject to important qualifications. In the first place the compromise must have been made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs ; and, secondly, no payment can be made under the compromise to the prejudice of the attorney’s claim after notice of it has been given to the person by whom the payment is made.

“These principles appear to me to be the clear result of the authorities in England ; and founded, as they are, on justice, equity and good conscience, I see no reason why they should not apply in this country.”

These two decisions, then, are authorities for the proposition that this Court has a summary jurisdiction over its suitors for the purpose of enforcing a solicitor’s lien for costs, and that in enforcing it the Court must be guided by the principles of English Law. Mr. Lowndes has invited me not to follow these decisions, because neither of them takes note of the law embodied expressly in the Indian Contract Act.

In *Ramdozal Serowgie v. Ramdeo*⁽²⁾, Sale, J., has expressed his dissent from the decision in *Khetter Kristo Mitter v. Kally*

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⁽¹⁾ (1898) 25 Cal. 887 at p. 890.⁽²⁾ (1899) 27 Cal. 269.

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Prosunno Ghose⁽¹⁾. But I prefer to follow the latter because it is supported by the decision of a Division Bench of this Court in *Deekabai v. Jefferson, Bhaishankar and Dinsha*⁽²⁾, which is binding upon me, sitting as a single Judge.

Passing, then, to the merits of the question, it was but very faintly argued before me that the compromise between Cullianji and Lakshmibai was either collusive or fraudulent. There must be clear evidence of collusion and conspiracy to deprive a solicitor of his costs (see the dictum of Fry, L. J., in *The Hope*).⁽³⁾ There is none here. On the other hand, the affidavits and the correspondence relied on at the Bar in the course of the argument leave no doubt on my mind that the compromise was honestly arrived at, and I find no trace whatever of any intention to defraud the solicitor. Nor can I hold upon the materials before me that the payments alleged to have been made to Lakshmibai in accordance with the compromise and admitted by Lakshmibai in her letters and telegrams to her solicitor are collusive transactions. The single fact relied upon by the solicitor's Counsel in impeachment of those payments is that Lakshmibai has not furnished to the solicitor any particulars, though she was frequently asked. But she has herself admitted in her letters and telegrams that she has received everything payable to her under the compromise.

The only ground, then, on which the solicitor, Mr. Hiralal Dayabhai, can rest his claim against Cullianji is that he made one payment, *i.e.*, of Rs. 5,853, to Lakshmibai on the 22nd of June 1904, after he had notice given to him of the lien by the letter of the 4th June 1904. As the other payments had been made before the notice, the lien cannot extend to them, and if Cullianji is liable, his liability can only be in respect of Rs. 5,853. But as to this amount it is contended for Cullianji by his Counsel, Mr. Lowndes, that it was paid on the 22nd of June 1904, because at that date it had become due on a *hundi* drawn by Cullianji in favour of Lakshmibai on a date prior to the date of the notice, *i.e.*, the 4th of June 1904. In other words, it is urged that when the *hundi* was drawn there was a payment

(1) (1898) 25 Cal. 887.

(2) (1886) 10 Bom. 218.

(3) (1883) 8 P. D. 144 at p. 145.

made under the compromise, and the subsequent payment of the amount in cash was a payment not under the compromise but in extinction of an independant liability arising under the *hundi*. Now, the facts bearing on this point, as disclosed in Cullianji's affidavit of the 27th of July 1904, are shortly these :—The compromise between him and Lakshmibai took place on the 5th of February 1904 and by that it was agreed that Cullianji should give her certain immoveable properties at Cutch and a sum of Rs. 15,583 in cash in full settlement of her claim and that of her daughter, and a further sum of Rs. 500 for her attorney's costs in both the suits. She was given possession of the immoveable properties in Cutch on the 21st February 1904, and on the same day Rs. 500 were paid to her as for her attorney's costs. As regards Rs. 15,583, Cullianji gave her three *hundis*, one for Rs. 5,000, the other for Rs. 5,000 and the third for Rs. 5,583, on his Bombay firm. The *hundis*, however, were not honoured on the due dates. Cullianji, therefore, paid the two amounts of Rs. 5,000 each by cheques in March and April last, and he paid Rs. 5,583 in cash on the 22nd of June.

Now the law applicable to this state of facts is thus succinctly stated in Leake on Contract:—"A negotiable security, as a bill or note, indorsed or delivered to and taken by the creditor on account of a simple contract debt, presumptively operates as a conditional payment, that is, payment with the condition that it is paid when due and that the debt revives if it is dishonoured. And the conditional payment operates as consideration for the security by implying forbearance of the debt during its currency. So where payment is to be made by bill by the terms of the contract, the bill given operates in conditional payment, and if dishonoured, it is the same in effect as if no bill had been given." (Leake on Contracts, 3rd Edition, p. 768.) In *In Re Romer & Haslam*⁽¹⁾ the Master of the Rolls said that it was perfectly well-known law that the giving of a negotiable security by a debtor to his creditor operated as a conditional payment only, and not as a satisfaction of the debt unless the parties agreed so to treat it. In *Jambuchetty v. Pallianappa Chettiar*⁽²⁾ the Madras High Court held that whether it was a note or a

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⁽¹⁾ [1893] 2 Q. B. 286 at p. 296.⁽²⁾ 13 Mad. L. J., p. 254.

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bill, it was a question of fact in either case whether the parties intended the same as absolute or conditional payment, and the presumption was that the effect of giving or taking a bill or note was that the debt was conditionally paid. There is nothing in the present case to rebut that presumption, and I hold that the payment of Rs. 5,853 to Lakshmibai was virtually one made under the compromise, and that Cullianji Sangjibhai is liable to satisfy Mr. Hiralal's lien of costs upon that amount.

I cannot, however, accede to Mr. Hiralal's prayer that Cullianji should be directed to deposit Rs. 9,000 or any lesser amount as security for such costs. The costs have yet to be taxed, and there is no reason to fear that Cullianji will remove out of the jurisdiction of the Court the property of which he asks to be put in possession.

The order I pass on both these motions is : Discharge the order of the 15th of November 1902.

Direct that the costs incurred by Mr. Hiralal Dayabhai as attorney of Lakshmibai, defendant No. 6 in suit No. 545 of 1891 and plaintiff in suit No. 625 of 1903, be taxed and that Cullianji, plaintiff in the former suit and defendant in the latter, do pay those costs up to the amount of Rs. 5,853. Mr. Hiralal to have his costs of both the motions from Cullianji, who is to have the liberty to appear before the Taxing Master when the bills are taxed.

Attorneys for plaintiff—*Messrs. Bhaishanker, Kanga and Gir-dharlal.*

Attorneys for defendant 1—*Messrs. Little & Co.*

Attorney for defendant 6—*Mr. Hiralal Dayabhai.*

Attorneys for defendant 8—*Messrs. Craigie, Lynch and Owen.*

A. H. S. A.

APPELLATE CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batty.*

THE TOWN MUNICIPALITY OF JAMBUSAR AND OTHERS (ORIGINAL
DEFENDANTS 1, 4 and 5), APPELLANTS, v. GIRJASHANKER NARSIRAM
(ORIGINAL PLAINTIFF), RESPONDENT.*

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July 17.

*Suit for damages for malicious prosecution—Commencement of prosecution
bonâ fide—Continuance malo animo—Reasonable and probable cause—
Question of fact.*

The plaintiff was a member of a joint Hindu family to which a house in Jambusar belonged. The tax in respect of this house fell into arrears. Summary proceedings before a Magistrate were instituted by the Municipality under the District Municipal Act. The amount was paid after the institution of the proceedings and the prosecution ended without a decision on the merits. The plaintiff brought this suit for damages for malicious prosecution against 5 defendants, namely (1) the Municipality of Jambusar, (2) and (3) the members of its Managing Committee, (4) its Secretary, and (5) its *Daroga*. The first Court dismissed the suit. The lower appellate Court passed a decree against defendants 1, 4 and 5 and awarded Rs. 55 as damages against them. On appeal to the High Court—

Held, that the suit should have been dismissed as against these defendants also, that the object of the Municipal Secretary being "to teach a minatory lesson to other defaulters on the disadvantages of non-payment of the tax", that could not be regarded as an indirect motive or as malice for the purposes of such a suit, it being a legitimate end of punishment to deter other evil-doers from offending in the same way.

Query :—Whether in such circumstances the Municipality could in any case be held liable for the malice imputed to its Secretary.

Held further that the Secretary was no party to the proceedings which were instituted by or on behalf of the Municipality. It was not in his power to determine whether proceedings should be instituted nor did he institute them in fact.

Held : as to the *Daroga* that the facts failed to establish a sufficient ground for legal liability. Though a suit will lie for malicious continuation of proceedings, it was not shown that the *Daroga* took any active step after the payment or that he persevered *malo animo* in the prosecution or that he had the intention of procuring *per nefas* the conviction of the accused.

Fitzjohn v. Mackinder (1) followed.

* Second appeal No. 669 of 1904.

(1) (1861) 30 L. J. (C. P.) 257 at p. 264.

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* SECOND appeal from the decision of H. S. Phadnis, Assistant Judge of Broach with full powers, setting aside the decree of M. N. Choksi, Subordinate Judge of Jambusar.

The plaintiff sued to recover from all or any of the five defendants Rs. 601 as damages for malicious prosecution under the following allegations:—

Plaintiff's father, who was the member of an undivided Hindu family, had seven houses standing in his name in the House-Tax Assessment Book of the Town Municipality of Jambusar. He died in the year 1892 and since then the houses were owned by the joint family, consisting of the plaintiff, the plaintiff's uncle and the latter's sons. No mutation of names was made in the Municipal Assessment Books and the houses continued to stand in the name of plaintiff's deceased father. On the evening of the 31st May 1900, the Managing Committee of the Municipality, defendant 1, with a view to set an example to others, maliciously and without reasonable and probable cause illegally sanctioned plaintiff's prosecution for arrears of house-tax, though he was not liable to pay it. Defendants 1—3, that is, the Town Municipality of Jambusar, defendant 1, and the members of the Managing Committee, defendants 2 and 3, were, therefore, liable for damages for malicious prosecution, and also defendant 4, the Secretary of the Municipality, in that he submitted a false report for the sanction. Though the plaintiff's cousin paid the tax in the morning of the 1st June following, the Municipal *Daroga* (Inspector), defendant 5, maliciously instituted the prosecution in the Magistrate's Court the same day. As the payment had been made, defendants 4 and 5 were bound to inform the Magistrate of the same and to withdraw the complaint, but they maliciously allowed the prosecution to continue.

Defendant 1, the Town Municipality of Jambusar, answered that the Municipality derived its chief income from the house-tax. In the year 1900 a very small amount of tax was realized in the first two months, therefore, after the expiry of the prescribed period of sixty days, the Secretary and the Managing Committee took legal steps to recover the tax and the *Daroga* lodged complaints against the defaulters, including the plaintiff, whose prosecution had been sanctioned. Test complaints were

lodged against the plaintiff and others, as in that year several well-to-do persons even did not pay the tax through obstinacy. The action of the Municipal servants was thus clearly legal. As owner, occupier and manager of the houses, the plaintiff was liable for the tax, and being fully aware of his liability, he had been paying the same. The plaintiff did not file any objection before the Managing Committee after the publication of the assessment list as required by the Municipal rules. He ought to have applied to the Municipality if he wanted to have his name entered in the Assessment Book. The Municipality did not know what expenses the plaintiff had incurred on account of his prosecution. He did not suffer in reputation and damages cannot be claimed for mental sufferings.

Defendants 2 and 3, members of the Managing Committee, added that as members of the Managing Committee they had to take the necessary steps to recover the house-tax, and during the year 1900 people having failed to pay the tax although demands were made, it became necessary in the interests of the Municipality to sanction the prosecution of the defaulters, including the plaintiff. The sanction was issued against the plaintiff on reasonable grounds but not through malice.

Defendant 4, the Secretary to the Municipality, answered further that the prosecutions were instituted with a view to save the defaulters from the payment of the penalty, and it was neither his duty nor that of the *Daroga* to withdraw the complaints.

Defendant 5, the Municipal *Daroga*, stated in addition to the above that he instituted complaints against those whose prosecutions were sanctioned by the Managing Committee in the morning of the 1st June 1900, and similarly a complaint was lodged against the plaintiff at that time. The tax was paid at about 1 p. m., but it was not paid before the complaint was filed, and it was not his duty to withdraw the complaint. When the Magistrate questioned the plaintiff with respect to the payment of the tax, he answered in the affirmative, and the plaintiff was, thereupon, acquitted. He was not enigmical with the plaintiff, and he filed a complaint against the plaintiff under the orders of the Managing Committee for a reasonable cause consisting in the

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failure of the plaintiff to pay the tax. He was not actuated by malice towards the plaintiff.

The Subordinate Judge found, *inter alia*, that the plaintiff was liable to pay the tax, that the sanction for plaintiff's prosecution was not illegal, that the plaintiff had neither proved want of reasonable and probable cause nor malice against any defendant separately, or all defendants jointly, and that the plaintiff had neither suffered any loss or injury in mind, or body, or reputation and was not entitled to damages. He, therefore, dismissed the suit.

On appeal by the plaintiff the Judge held that by reason of its Secretary's illegal act, the defendant Municipality instituted false and illegal criminal proceedings against the plaintiff maliciously and without reasonable and probable cause, that defendant 4 did the same, that the prosecution was continued by defendants 1, 4 and 5 maliciously and without reasonable and probable cause, that the plaintiff suffered damages to the extent of Rs. 55 in consequence, and that defendants 1, 4 and 5 were liable to pay the damages and not defendants 2 and 3. He, therefore, passed a decree in the following terms:—

The decree of the lower Court set aside and the following passed in its stead:— Defendants 1, 4 and 5 to pay Rs. 55 and his costs in both Courts to plaintiff, except pleader's fee in both Courts, which is awarded on the decreed amount only, as damages seem to me to be needlessly over-valued; defendants to bear their respective costs.

The following are extracts from the judgment of the Judge:—

In the written statements it is affirmed that though the houses stood in plaintiff's father's name, it was plaintiff who was all along paying the tax after the father's demise. But not a single scrap of paper or an iota of some other reliable evidence is produced in support of the assertion. On the other hand the plaintiff had produced three receipts which show that in 1897 the tax was paid by the uncle's son Pranshankar and in 1898 and 1899 by the uncle himself. The legitimate conclusion from this evidence on one side and the absence of evidence on the other is that the tax has been during the preceding years paid by and accepted from the uncle or his sons and at no time by or from plaintiff. I therefore hold that in 1900 plaintiff was not the owner nor was considered by the Municipality until the sanction affair as owner liable to pay the tax under the rule.

Assuming he was such owner, that alone is, under the rules, insufficient to justify his prosecution for non-payment. This conclusion arises from the wording of rule 129 read with rule 125. The former runs:—"If in any case the

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assessment due is not paid within the prescribed period of time, proceedings for the recovery of the arrears shall be taken against the defaulter under section 84, &c., &c." Who is meant by "the defaulter" may be gathered from rule 125 : "With the aid of the assessment book the Secretary shall prepare an assessment list and post copies of it at the Municipal and other public offices and at all conspicuous places throughout the town on or before 31st March each year. *In the list shall be shown the name of every person liable to the tax*, the year for which it is payable, &c. &c." The words italicized plainly indicate that for the purposes of a prosecution under rule 129 a defaulter is only he whose name has been shown in the list as liable to pay the tax and who has not so paid within the prescribed time. And the reason is obvious. Instituting criminal proceedings against a man being always a serious matter, the framers of the rule wisely and naturally enough provided that tax-payers should have a clear and definite knowledge of their liability, and if with such knowledge they fail to pay they do so at their own risk. The publication of the list is in this sense no more than a written public intimation to and demand on the tax-payers to take note of their liability and to pay in due time. I therefore think that the defaulter contemplated in rule 129 is he and only he whose name appears in the list as liable to pay the tax and who has failed to pay it within the prescribed time and that the rule sanctions and directs the prosecution of such defaulter only and of no other person. It will be argued that supposing a wrong name or a deceased person's name is erroneously inserted in the list, should the Municipality forego the tax standing against that name? The answer is that the Municipality need make no such sacrifice; it is at liberty to recover the arrears by having recourse to the Civil Court, but it is not at liberty to run up to the Magistrate because the erroneous entry being the result of its own officials bars it from the latter and simpler mode of realizing its dues. Rules 122—24 impose on the General Committee and the Secretary the duty of preparing and revising the assessment book each year, and if neither of them performs that duty carefully and regularly the Municipality must be prepared to suffer the consequences of such non-performance.

* * * * *

Now to proceed. From the above resumé of facts it is evident that the originator of this prosecution was the Secretary, defendant 4. He has admitted that much in his written statement (Exhibit 13), though in his deposition (Exhibit 229) he has turned round and made a feeble and futile attempt to throw the blame on the two members of the Managing Committee who sanctioned the prosecution. In the written statement he says: "During the first two months there were very small collections; the chief source of income is the house-tax; hence as Secretary I felt myself bound to bring this matter to the notice of the Managing Committee and I did so. Many persons (who could have paid very easily) did not pay up their tax thinking it necessary that steps should be taken for recovery of house-tax, I submitted a report before the Managing Committee as usual, giving names of a few persons from different communities and asked for a sanction to prosecute, which being granted complaints were legally lodged."

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I have shown above that plaintiff was not a defaulter and consequently not liable to prosecution under rule 129. The further question here arises, namely, whether the Secretary had that knowledge at the time he applied for sanction and had the prosecution instituted. If he really *bond fide* and reasonably believed that plaintiff was a defaulter, howsoever erroneous that belief, he is protected by the rule of reasonable and probable cause. It is possible and may be conceded that, being a layman, he could not have concluded on *a priori* and legal reasoning that plaintiff was not a defaulter. But elementary common sense, ordinary regard for the rights of other and also perhaps the practice of his own office would have advised him, if he was open to such advice, that he could not fairly consider the plaintiff, from a practical and businesslike point of view, a defaulter so as to justify the prosecution. In preparing his list of defaulters selected for prosecution he seemed to have acted in a most careless and negligent way so as to preclude himself from the benefit of the rule of just and lawful cause. The degree of care devoted to the preparation of the list may fairly be measured by the fact that the names of two persons (Kila Kahandas and Girdhar Bajibhai) who were dead were entered up in the list. On this point the Secretary says: I knew both were dead, still the sanction for prosecution was given against them, the explanation being that we were in haste and it was growing evening and so the fact might have escaped memory.

Rashness in making a charge, which is in fact believed, is not of itself actionable. But where there is a ready and obvious mode of ascertaining the truth of the charge and the opportunity of so doing is neglected by the defendant, the absence of inquiry is an element in determining the question of the presence or absence of probable cause (Mayne Criminal Law, p. 595).

Here not only was the mode of ascertaining the truth available to the Secretary, but most of the material facts were apparently known to him. He knew that the rules required the names of the persons liable for the tax should be entered in the assessment list, that the list purported to show such names for all the houses comprised in it and that in the column of these names the name entered against the houses in question was that of plaintiff's father and not plaintiff's. He further knew that the most senior member and so presumably the head of plaintiff's family was plaintiff's uncle Gavrishankar, that that uncle was Municipal Councillor, that the tax on these houses was upto then paid by the uncle and his sons and that it was never paid, at least in recent years, by the plaintiff. These facts should have left no doubt in his mind as to the person liable to pay and on default to be prosecuted. If per chance he had any doubts he could have easily cleared them up by reference to the said uncle. Instead of following this obvious course, what does he do? He coolly put down plaintiff's name as one of the defaulting persons to be prosecuted, though the whole weight of his official information weighed against that view. I can only say that this action of the Secretary was wholly unwarranted and arbitrary, was not a use but a wilful abuse of official authority.

In so acting the Secretary was not, I think, actuated by any personal grudge or malice; plaintiff admits that there is no enmity between them. What precise

motives influenced him the record does not disclose, neither need we care to know them. Personal or express malice is not an essential element in an action for malicious prosecution. It is sufficient if plaintiff shows that the defendant acted maliciously, that is, from some indirect motive (*Pestonji v. The Queen Insurance Company*, 25 Bom., 332-335). What the law means by indirect motive is indicated and illustrated in the above cited passage from Addison, namely, any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice (Addison on Torts, 6th Edition, p. 225). The written statement and the Secretary's report plainly show that the object of these prosecutions was to teach a minatory lesson to the other defaulters on the disadvantages of non-payment of the tax—a motive precisely similar to that instanced in the said passage as improper and therefore malicious.

* * * * *

Here the payment was made the very day the proceedings against the plaintiff were instituted. The Secretary had due notice—as the Magistrate's proceedings show—of the several days of the hearing. But he did not instruct the Daroga to withdraw from the prosecution or send an intimation to the Magistrate of the fact of receipt of the tax. Nay, more, the Magistrate visited the Municipal Office to attend meetings on 7th, 9th and 20th June, as the proceedings book shows (it may be noted in passing that this book is neither paged nor sealed, and a leaf seems to have been taken away from it), and at the meetings of the 9th and 20th sanction for prosecution was obtained. But on those occasions neither the Secretary nor the Daroga whispered a single word into the ear of the Magistrate regarding this payment or payments made by the other prosecuted defaulters. The result was that, as far as this case is concerned, the plaintiff had to attend the Magistrate's Court with his pleader in the district, pass a bail bond and answer to a notice why the bond should not be forfeited. *Malò animo* required by the above rule may fairly be inferred from this gross negligence and carelessness on the part of the Secretary.

I therefore hold that defendant 4 is liable to plaintiff in damages.

As regards the Daroga, defendant 5, there is no definite or reliable evidence that he took any active part in the preparation of the list of defaulters to be prosecuted, though he was present at the meeting of the 31st May and suggested with the Secretary—so he says in his deposition (Exhibit 209)—that the complaints should be filed in the Court of a particular Magistrate, on the ground that a number of Municipal prosecutions for house-tax were pending before the other Magistrates. In instituting the prosecution he merely carried out the behests of the Managing Committee and the Secretary without using his own judgment and discretion in the matter. Without positive evidence (which is absent) to that effect it cannot be assumed that he had knowledge, as the Secretary had, that plaintiff was not a defaulter. It was not part of his duty to recommend and obtain sanction for prosecution. I therefore hold him not liable for the institution of the prosecution, though it was his hand which put the signature and affirmation to the complaint.

But I hold him responsible for the continuation of the proceedings after payment. It was he that was in immediate charge of the prosecution. He

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accepted that task with all its privileges and with all its liabilities. One of the liabilities was to take steps for dropping the proceedings on payment, but he took no steps of the kind, and it was only on being specially sent for that he appeared before the Magistrate to admit payment. The remarks made about the Secretary in this connection apply *mutatis mutandis* to this defendant also. He seems to have private grudge also against plaintiff's family.* * At any rate, he is thus unfriendly to the plaintiff and under the circumstances it is not unreasonable to infer that that feeling partly contributed to the prolongation of the proceedings.

As regards defendant 1, the Municipality, in view of doubts expressed by text-writers, it is somewhat difficult to say whether an action for the malicious prosecution will lie against a Municipality. Pollock says;—As in the case of deceit, and for similar reasons, it has been doubted whether an action for malicious prosecution will lie, against a corporation. It seems on principle that such an action will lie if the wrongful act was done by a servant of the corporation in the course of his employment and in the company's supposed interest, and it has been so held, but there are dicta to the contrary (p. 264, 1887 Edition).

The ordinary rule is that a master is liable for wrong done to third parties by his servant, even though it be a wilful wrong, provided the act was done on his behalf and with the intention of serving his purpose (30 Cal. 207). No Indian case was cited in argument, none is given in Ratanlal's Torts (p. 234), nor have I been able to find any bearing on the point, whether the rule applies to a Municipality. Corporations are liable to be sued for torts of all kinds committed by their agents, provided the act was done within the scope of the agent's employment and that the employment was within the scope of the corporate powers (Ratanlal, p. 24); a corporation is liable for a libel published by its authority, although the Corporation, as distinct from its members, cannot be guilty of malice in the ordinary sense of the word (*ibid.*, 162). If so, there is no reason why it should not be amenable to an action for malicious prosecution, or why the opinion of Pollock should not be accepted as expressing the correct rule. Though differently constituted from an ordinary corporation in regard to its government, duties and privileges, a Municipality stands, in my opinion, on the same footing as a corporation in regard to wrongful acts of its servants, unless the statute creating it provides exemptions from liabilities for any of such acts, and there is no such exemption provided in the Municipal Acts in regard to malicious prosecutions. I therefore hold that the above rule applies to a Municipality also.

The Secretary in this case was a properly appointed officer of the Municipality and started criminal proceedings against the plaintiff in the course of his official duties in the supposed interests of the Municipality, defendant 1, which is therefore liable.

Apart from the rule it is, I think, not liable. It, i.e., its constituent part the Managing Committee, sanctioned the prosecution on the information supplied by the Secretary. It *bonâ fide* believed in that information, and had

no reason to doubt its accuracy. The Managing Committee is not to be blamed for the continuance of the prosecution after payment, because it is not shown that the payment was reported to it.

Defendants 1, 4 and 5 preferred a second appeal.

Gokuldas K. Parekh appeared for the appellants (defendants 1, 4 and 5). He relied on the following authorities :—*Stevens v. Midland Counties Railway Co.*⁽¹⁾; *Abrath v. North Eastern Railway Co.*⁽²⁾; *Fitzjohn v. Mackinder*⁽³⁾; Addison on Torts, p. 226, 7th edition.

G. S. Rao appeared for the respondent (plaintiff). He relied on the following authorities :—*Pestonji M. Mody v. The Queen Insurance Company*⁽⁴⁾; *Citizens' Life Assurance Company v. Brown*⁽⁵⁾; *Fitzjohn v. Mackinder*⁽³⁾.

JENKINS, C. J. :—The plaintiff has brought this suit to recover Rs. 601 as damages for malicious prosecution against five defendants, of whom the first is the Municipality of Jambusar, the second and third members of the Municipality's Managing Committee, the fourth its Secretary, and the fifth its Daroga. The first Court dismissed the suit with costs, but the lower appellate Court reversed the decree as to defendants 1, 4 and 5, and awarded Rs. 55 as damages against them. From that decree these defendants have preferred the present appeal. The plaintiff is a member of a joint Hindu family, to which a house in Jambusar belongs. The tax in respect of this house having fallen into arrear, proceedings were taken by the Municipality against the plaintiff for the recovery of the amount by summary proceeding before a Magistrate under the District Municipal Act. As the amount was paid after the institution of the proceedings, the prosecution ended without a decision on the merits. It is on these proceedings that the plaintiff bases his present claim. The first Court thought proceedings were properly taken against the plaintiff; that there was reasonable and probable cause; and that there was no malice. The lower appellate

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(1) (1854) 10 Exch. 352.

(3) (1861) 9 C. B., N. S., 505 at 531.

(2) (1886) 11 App. Cas. 247.

(4) (1900) 25 Bom. 332 at 336.

(5) [1904] A. C. 423.

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"Court took the opposite view on each of these points as against the present appellants. With its findings of fact, we cannot interfere except so far as they may be vitiated by any error of law. For the sake of argument too we will assume that the lower appellate Court has rightly decided that the non-appearance of the plaintiff's name in the assessment list furnished an answer to the proceedings against him, and we will deal with the case on that footing.

First we will take the case of the Secretary: we are clear that as against him the suit is misconceived; he was no party to the proceedings, for they were instituted by, or on behalf of, the Municipality. He is simply the servant of the Municipality to whom he reported the arrears and made a suggestion as to the steps to be taken. It was not for him to determine whether the plaintiff should be prosecuted, and neither was it in his power to institute, nor did he in fact institute the proceedings: so that as the case is framed the first essential element of a suit of this class against him is absent.

We next come to the case of defendant No. 5: he too is a servant of the Municipality, and as to him the lower appellate Court has found that he was not liable for the institution of the prosecution; it has held against him on the ground that he had continued the proceedings after the payment of the amount. Now what are the facts as to this? The plaintiff attempted to make out that the arrears were paid up before the prosecution was commenced, but both Courts have negatived this. The Judge of the lower appellate Court, however, considers that as defendant 5 failed to stop the proceedings as soon as the payment was made he acted maliciously. The Judge of the lower appellate Court seems to have condemned the fact that the Daroga on the occasions when the Magistrate attended the Municipal office on other matters, never "whispered a single word in the ear of the Magistrate regarding this payment or payments made by the other prosecuted defaulters." It is a novel doctrine that Magistrates are thus to be informed in private conversation of matters that concern judicial proceedings pending before them, and that failure in this respect is to excite criticism and even be regarded as a circumstance of adverse significance.

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We notice that the Judge of the lower appellate Court for some reason, which is not apparent, refuses to accept the first Court's appreciation of the oral evidence, and holds that "the Daroga is unfriendly to the plaintiff." We are bound by this finding, but still we think that the facts found do not constitute a sufficient ground for legal liability against the 5th defendant.

Suits like the present are ordinarily brought for the malicious *institution* of proceedings, but they no doubt also lie for their malicious continuation.

The conditions then necessary are thus indicated by Cockburn, C. J., in *Fitzjohn v. Mackinder* ⁽¹⁾, where he says "a prosecution, though in the outset not malicious, as having been undertaken at the dictation of a Judge or Magistrate, or if spontaneous from having been commenced under a *bond fide* belief in the guilt of the accused, may, nevertheless, become malicious in any of the stages through which it has to pass if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malò animo* in the prosecution, with the intention of procuring *per nefas* a conviction of the accused."

The facts of this case fall wholly short of this.

After the payment was made the Daroga took no active step, he in no sense persevered *malò animo* in the prosecution, nor is it shown that he had the intention of procuring *per nefas* a conviction of the accused; and we hold that there is nothing in the facts found to bring the case within the grounds of liability laid down by Cockburn, C. J.

It only now remains for us to consider the case against the Municipality.

On the issue "Did the defendant Municipality institute false and illegal proceedings against the plaintiff maliciously and without reasonable and probable cause?" the finding recorded is, "Yes, by the reason of the Secretary's illegal act." The precise meaning of this finding is made clearer in the judgment, from which it is apparent that the Judge of the lower appellate Court exonerated the Managing Committee from all malice and also the Municipality, except so far as the malice of the Secretary was imputable to it. Then what is the malice of the Secretary?

(1) (1861) 30 L. J. (C. P.) 257 at p. 264.

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The Judge holds that the Secretary was not "actuated by any personal grudge or malice"; he thinks, however, that there was an indirect motive; that the prosecution was not merely for the purpose of bringing a person to justice, but also "to teach a minatory lesson to the other defaulters on the disadvantages of non-payment of the tax." But here, we think, the learned Judge has gone astray. We have always understood it to be recognized as the legitimate end of punishment to deter other evil-doers from offending in the same way "*ut pœna ad paucos metus ad omnes perveniat*."

"The immediate principal end of punishment," it is said, "is to control action. This action is that of the offender or of others..... that of others it can influence no otherwise than by its influence over their wills, in which case it is said to operate in the way of example" (Bentham's Principles of Morals and Legislation, page 70). This seems to correspond with the "minatory lesson" which the learned Judge condemns. We have no doubt that the learned Judge has erred in law in regarding the Secretary's desire to impart this "minatory lesson" as malice for the purposes of the present suit. Apart from this, we much doubt whether in the circumstances of this case the Municipality could be held liable for malice imputed to its Secretary: but in the view we take it is unnecessary to elaborate this point.

We have not dealt with the Judge's finding as to reasonable and probable cause, for though in the leading case of *Panton v. Williams* ⁽¹⁾ the Court of Exchequer Chamber in a considered judgment laid down that "where the question of reasonable and probable cause depends entirely on the proof of the facts and circumstances, which gave rise to and attended the prosecution, no doubt has ever existed from the time of the earliest authorities, but that such question is purely a question of law to be decided by the Judge;" still here regard must be had to the concluding words of the judgment in *Pestonji M. Mody v. The Queen Insurance Company* ⁽²⁾.

(1) (1841) 10 L. J. (Ex.) 545 at p. 553.

(2) (1900) 25 Bom. 332, at p. 336;
2 Bom. L. R. 939.

But we cannot help noticing that what the lower appellate Court took as a sign of the want of reasonable and probable cause was a mistake—if mistake it was—on a difficult question of law which the first Court in a careful judgment held to be no mistake.

And in this connection the latest pronouncement of the Privy Council is important, where it was laid down by Lord Davey in delivering the judgment in *Cox v. English, Scottish, and Australian Bank*, ⁽¹⁾ that, "The plaintiff has also to prove that there was a want of reasonable and probable cause for the prosecution, or (as it may be otherwise stated) that the circumstances of the case were such as to be, in the eyes of the judge, inconsistent with the existence of reasonable and probable cause." We doubt whether this was observed by the Judge of the lower appellate Court.

But apart from this the decree of the lower appellate Court against defendants Nos. 1, 4 and 5 must be reversed and that of the first Court restored with costs throughout.

Decree reversed.

G. B. R.

(1) [1935] A. C. 168 at p. 171.

CRIMINAL REVISION.

Before Mr. Justice Russell and Mr. Justice Batty.

EMPEROR v. DATTO HANMANT SHAHAPURKAR.*

Criminal Procedure Code (Act V of 1898), sections 222, 239—Successive breaches of trust—Joinder of charges—Joint trial—Same transaction—'Transaction' meaning of.

Where the accused persons were jointly in charge of trust funds, so that one could not act without the connivance of the other, and each of them misappropriated sums of money from the trust funds to his own use, thus evidently carrying through their object in concert, the fact that they carried out their scheme by successive acts done at intervals, alternately taking the benefits, did not prevent the unity of the project from constituting the series of acts one transaction, i.e., the carrying through of the same object which both had from the first act to the last: and there was no objection to their being tried jointly at one trial.

* Criminal Application for Revision No. 77 of 1905.

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Section 222 of the Criminal Procedure Code (Act V of 1898) clearly admits of the trial of any number of acts of breach of trust committed within the year as amounting only to one offence. The section does not require any particular formulation of the accusation, but only enacts that it is sufficient to show the aggregate offence without specifying the details. It dispenses with the necessity of amplification: it does not prohibit enumeration of the particular items in the charge.

Section 239 of the Criminal Procedure Code (Act V of 1898) admits of the joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction, within the meaning of section 239. It is not necessary that the charge should contain the statement as to the transaction being one and the same. It is the tenour of the accusation and not the wording of the charge that must be considered as the test.

In section 239 of the Code, a series of acts separated by intervals of time are not excluded, provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal, this suffices to justify the joint trial, even if incidentally, one of those jointly tried has done an act for which the other may not be responsible.

The foundation for the procedure in section 239 is the association of two persons concurring from start to finish to attain the same end. No doubt if it were attempted to associate in the trial a person who had no connection whatever with the transaction at a time when one or more of the series of the acts alleged had been done then that would be outside the provisions of the section.

"Transaction" means "carrying through" and suggests not necessarily proximity in time—so much as continuity of action and purpose.

APPLICATION under section 435 of the Criminal Procedure Code (Act V 1898), for revision of conviction and sentence passed on appeal by A. Lucas, Sessions Judge of Sátára, confirming conviction and sentence recorded by J. E. Sahasrabudhe, First Class Magistrate of Sátára.

The accused No. 1 (Datto Hanmant) was the Karbhari and the accused No. 2 (Ganesh Waman Bhagwat) was the *nagdi* karkun (cashier) of the complainant, Sardar Gangadhar Luxaman Swami of Chafal.

On the 18th April 1898, the complainant left Chafal to go to the Nizam's dominions on business in connection with the regrant of a village. Previous to his departure, the complainant counted his "khasgi" or private balance and handed it over to the two accused.

The complainant did not again verify his cash balance till the 9th June 1903, when he found, on examining the accounts, that Rs. 5,249 remained to be accounted for. He, therefore, charged the two accused with having embezzled that amount. As the alleged embezzlements might have extended over more than five years during which the accused had unchecked control over the Swami's cash, the accused were charged each with having embezzled three items within the period of one year beginning from the 18th April 1898.

Datto Hanmant (accused No. 1) was charged with having misappropriated Rs. 650 on the 11th December 1898, Rs. 1,500 on the 12th February 1899, and Rs. 700 at some date unspecified in 1899. And Ganesh Waman was said to have embezzled Rs. 400 on the 21st August 1898, Rs. 400 on the 22nd December 1898, and Rs. 200 on the 17th July 1899.

They were tried together at one trial by the First Class Magistrate of Sâtara, who convicted them of offences under section 408 of the Indian Penal Code and ordered that "each of the two accused should suffer rigorous imprisonment for four months for each head of the charge and should also pay a fine of Rs. 300. The sentences to run one after the other."

On appeal the Sessions Judge of Sâtara confirmed the convictions, with the exception that the accused No. 2 was not held answerable for Rs. 200, as the item could not be included in the charge, having "been embezzled more than a year after 18th April 1898." The sentences passed on the two accused were confirmed.

Datto Hanmant (accused No. 1) filed this application, contending *inter alia* that the joint trial of the two accused was illegal, that as each of the accused was charged with having committed three distinct acts of misappropriation in respect of three separate sums on three different occasions quite independent of each other, the trial was illegal and had prejudiced the defence; and that it was not alleged by the prosecution that either of the accused was any way concerned with the criminal breach of trust by the other in respect of three distinct sums respectively shown in the charges framed against them.

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Robertson (with him *M. V. Bhat*), for the accused :—We submit that the various offences with which the accused is charged exceed three in number and they were not committed within one year. These offences cannot therefore be tried together. See section 234 of the Criminal Procedure Code (Act V of 1898). Secondly we say that the offences with which the accused (applicant) is charged are totally distinct offences from those with which Ganesh (accused No. 2) has been charged ; and that, therefore, the two accused persons cannot be tried together at one trial. See section 239 of the Criminal Procedure Code (Act V of 1898). A joint trial of two or more persons is permissible only if they are accused of the same offence or of different offences committed in the same transaction or of having abetted one another in committing an offence. The question in the present case is, were the different acts done by the accused so connected together as to form parts of the same transaction. We submit that there was no joint action on the part of the accused ; each acted independently of the other. In framing the charges also each of the accused is charged with having committed three distinct acts of misappropriation in respect of three separate sums on three different occasions quite independent of each other. Neither was in any way privy to or connected with the acts committed by the other. The joint trial was, therefore, illegal. See *Emperor v. Jethalal Hurlochand* ⁽¹⁾, where the remarks on which we rely are at page 465. In this case there is no evidence of preconcert between the two accused.

Binning (with him *D. A. Khare*), for the complainant :—As to the first point we submit that section 222 of the Criminal Procedure Code (Act V of 1898) admits of the trial of any number of acts of breach of trust committed within the year as amounting only to one offence. It enacts that it is sufficient to show the aggregate offence without specifying details. On the second point we submit that the case for the prosecution is that both the accused were acting in concert and had a common intention. In this case both the accused are found to be jointly in charge of the trust fund, so that one could not have acted without the connivance of the other.

Vasudeo J. Kirtikar, Government Pleader, for the Crown.

¹⁾ (1905) 29 Bom. 449 ; 7 Bom. L. R. 527.

BATTY, J.—In this case the two accused Datto Hanmant and Ganesh Waman, having been entrusted with certain moneys belonging to the Swami of Chafal, the first as Karbhari and the second as cashier, were accused of having committed breach of trust in respect of those moneys; Datto, the first accused, having, it is alleged, taken Rs. 650 on the 11th December 1898, Rs. 1,500 on the 12th February 1899, and Rs. 700 at some date unspecified in 1899; while Ganesh Waman is said to have committed breach of trust in respect of Rs. 400 on the 21st August 1898, Rs. 400 on the 21st December 1898 and Rs. 200 on the 17th July 1899.

Both the accused were convicted: each of them in respect of each item which he was alleged to have taken: except that Ganesh was not convicted in respect of the last mentioned item of Rs. 200.

The present application is one for revision in favour of Datto on the ground of misjoinder of charges. Certain facts connected with the grounds assigned for conviction have been stated to us, but in revision we do not ordinarily interfere with findings of fact and in the present case see no reason for departing from the ordinary practice.

The objections taken are, first that the various offences exceed three in number and were not all committed within one year, and that therefore the offences could not be tried together; secondly that the offences with which Datto has been charged are totally distinct offences from those with which Ganesh has been charged and that therefore the two accused persons could not be tried together under section 239 of the Criminal Procedure Code.

We think with reference to the first objection that section 222 clearly admits of the trial of any number of acts of breach of trust committed within the year as amounting only to one offence. Section 222 does not require any particular formulation of the accusation, but only enacts that it is sufficient to show the aggregate offence without specifying the details. It dispenses with the necessity of amplification: it does not prohibit enumeration of the particular items in the charge. In this instance the objection to the charge is practically that it is more specific than it need have been, that it gave more details than are required under that section. This objection amounts, at most, to this that

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there has been—a merely formal error in the drafting of the charge—an error in the form of the charge which certainly could not have prejudiced the accused and is one which may be dealt with as coming within section 537. The introduction of greater detail than is legally necessary in no way affects the jurisdiction of the Court. Taken by themselves, the charges against Datto and Ganesh may, therefore, respectively be regarded as one offence against each.

The only objection to the trial that remains for consideration is, whether these offences according to the accusation were offences committed in the same transaction. Section 239 admits of the joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction, within the meaning of section 239. It is not necessary that the charge should contain the statement as to the transaction being one and the same. It is the tenour of the accusation and not the wording of the charge that must be considered as the test. And in this case, it is for the appellant to show that no such connection between the offences alleged against the two accused was set forth as would satisfy the condition required for a joint trial.

We think that the argument of the learned Counsel for the appellant would have been more convincing if no continuity of action and purpose, common to both the accused throughout, had been alleged in the case presented by the prosecution. The word “transaction” is unfortunately not defined in the Code and the meaning to be attached to it must be gathered from the context in which it occurs in various sections and illustrations.

According to its etymological and dictionary meaning the word “transaction” means “carrying through” and suggests, we think, not necessarily proximity in time—so much as continuity of action and purpose. The same metaphor implied by that word is continued in the illustrations where the phrase used is “in the course of the same transaction.” In section 215, the phrase is used in a connection which implies that there may be a series of acts—illustration (f) to that section indicates that the successive acts

may be separated by an interval of time and that the essential is the progressive action, all pointing to the same object. In section 239, therefore, a series of acts separated by intervals of time are not, we think, excluded, provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal this suffices to justify the joint trial, even if incidentally, one of those jointly tried has done an act for which the other may not be responsible (*vide* section 239, illustration (b)).

We think the foundation for the procedure in that section is the association of two persons concurring from start to finish to attain the same end. No doubt if it were attempted to associate in the trial a person who had no connection whatever with the transaction at a time when one or more of the series of the acts alleged had been done, then it might be urged that would be outside the provisions of the section. But since in this case two persons have associated for the carrying out of one particular common object, *viz.* a breach of trust, the continuance of that object and the progressive execution of it by successive acts seem to satisfy the test and criterion implied in section 239. In this case it has apparently been found by the lower Court that the accused were jointly in charge of the trust fund, one of the accused being the Karbhari and the other cashier. The one could not act without the connivance of the other: and they both evidently carried through their object in concert. That they carried out their scheme by successive acts done at intervals, alternately taking the benefits, does not prevent the unity of the project from constituting the series of acts one transaction, *i.e.*, the carrying through of the same object which both had from the first act to the last. The objections raised are insufficient.

We accordingly reject the application.

Application rejected.

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APPELLATE CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Aston.*

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July 25.

SHA VADIHAL HAKAMCHAND (ORIGINAL DEFENDANT 2), APPELLANT, v.
SHA FULCHAND UMEDRAM (ORIGINAL DEFENDANT 1), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sections 623 and 626—Order in execution—Decree—Review—Order rejecting application for review—Appeal.

An order in execution, being a decree under the Civil Procedure Code (Act XIV of 1882), was passed on the 20th November 1902 and a supplementary order as to costs was made on the 20th December following. On the 3rd August 1903 the party aggrieved by the latter order applied under section 623 of the Civil Procedure Code for a review of judgment. Notice was issued to the opposite party and the application for review was heard with the result that the Judge after disposing of certain technical objections proceeded to deal with the case on the merits and having done so he rejected the application for review with costs on the 14th September 1903. Against the said order the applicant having appealed,

Held that the order rejecting the application for review was not appealable. The proper procedure would be to appeal from the order of the 20th December 1902 relating to costs.

A petition of review involves three stages of procedure. The first stage commences ordinarily with an *ex parte* application under section 623 of the Civil Procedure Code. The Court may then either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or rejected and the hearing of the rule may involve to some extent an investigation into the merits. If the rule is discharged then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached. The case is re-heard on the merits and may result in a repetition of the former decree or some variation of it. Though in one aspect the result is the same whether the rule be discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for in the latter case, the whole matter having been re-opened, there is a fresh decree. In the former case the parties are relegated to, and still rest, on the old decree.

SECOND APPEAL from the decision of Lallubhai P. Parekh, Judge of the Court of Small Causes at Ahmedabad, with appellate powers, amending the order of Chandulal Mathuradas, First Class

* Second appeal No. 157 of 1905.

Subordinate Judge of Ahmedabad, in an application for the review of an order as to costs.

One Bhogilal Khemchand brought a suit for partition against his co-parceners Fulchand Umedram and Vadilal Hakamchand in the Court of the First Class Subordinate Judge of Ahmedabad and obtained a decree awarding him a third share in certain properties. Subsequently in execution of the decree the Subordinate Judge effected a partition and awarded certain properties to each of the parties. At the said partition a shop which was in the possession of Fulchand Umedram fell to the share of Vadilal Hakamchand and he presented a darkhast, No. 754 of 1902, for the recovery of the shop. The First Class Subordinate Judge made an order for the delivery of the shop on the 20th November 1902 and at the same time valued the shop at Rs. 825 and ordered Vadilal to pay the Court-fee stamps on the said sum. Vadilal having accordingly paid the Court-fee stamps amounting to Rs. 62-4-0, the darkhast was disposed of on the 20th December 1902. In disposing of the darkhast the Judge saddled Fulchand with costs including Rs. 62-4-0 paid by Vadilal as Court-fee stamps on the value of the shop. Against the said order as to costs Fulchand presented an application for review on the 3rd August 1903. A *rule nisi* was issued requiring Vadilal to show cause why the application should not be granted and he resisted the application on the ground that it was time-barred under Article 173, Schedule II, of the Limitation Act (XV of 1877). The Subordinate Judge over-ruled the said plea, and on the 14th September 1903 dismissed the application on the following ground:—

As to the merits I do not think that the applicant can succeed. Mr. Karpuram has thrown all costs on the applicant Fulchand and Vadilal's darkhast was due to Fulchand's default. He raised frivolous objections in Vadilal's application for execution and I consider the order made is a good one. The application for review is rejected with costs.

On appeal by Fulchand the Appellate Judge amended the said order in the following terms:—

I then hold * * that the order dated 20th December 1902 made by the First Class Subordinate Judge should be revised by ordering the appellant to bear the costs of the darkhast and the respondent to bear the costs of the Court-fees on the value of the shop.

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I then allow this appeal to the extent shown above and amend the order of the lower Court dated 20th December 1902, and order that out of the costs of Rs. 67-1-0 dealt with in the darkhast, the appellant shall pay Rs. 4-13-0 only to the respondent and the respondent shall bear the rest, viz., Rs. 62-4-0. The costs of the application for review and of this appeal shall be borne by the respondent.

The applicant Vadilal (original defendant 2) preferred a second appeal.

L. A. Shah appeared for the appellant (applicant, defendant 2):—The order of the Judge in appeal is wrong. The order of the 14th September 1903 was not appealable, section 629 of the Civil Procedure Code. The first Court having rejected the application for review, the appellate Court, in entertaining the appeal, either exercised jurisdiction not vested in it, or it acted on the assumption that the application was granted by the first Court, but it was not so. The only order appealable, if at all, was that passed on the 20th December 1902. But now an appeal against that order would be too late.

Trikamlal R. Desai appeared for the respondent (opponent, defendant 1):—The order of the 14th September 1903 was appealable because strictly speaking the application for review was not rejected, but on the contrary a *rule nisi* was issued and after hearing arguments the Court disallowed the technical objections raised by the appellant and then it rejected our application on the merits. The Court in a sense allowed the review.

[JENKINS, C. J.—How do you say that the application for review was granted when the Judge says in so many words “the application for review is rejected” ?]

We submit that in a petition for review there are two stages. The first stage ends when a *rule nisi* is issued and the opponent is heard against the application. As soon as this is done, that is, the opponent's objections, if any, are disposed of and the Court proceeds to the merits of the case, the second stage commences. An order made after the commencement of the second stage would have the effect of a decree and would be appealable even if the original decree be confirmed by the order. The endorsement of the Court on our application for review was to the effect that

the application was granted and the objections to it were disallowed. The Court then proceeded to discuss the merits and having done so it afterwards rejected the application. The order of rejection was a fresh decree repeating the order of the 20th December 1902. Therefore that order was appealable under section 244 of the Civil Procedure Code. If it be held that the order was not appealable and that an appeal ought to have been preferred against the order of the 20th December 1902, then under section 5(A) of the Limitation Act the delay in the presentation of the appeal from that order may be excused.

Shah in reply :—The appeal may be treated as an appeal from the order dated the 20th December 1902.

JENKINS, C. J.:—This is an appeal from a decree of the District Court of Ahmedabad and the objection taken is that the lower appellate Court treated the appeal to it as an appeal from an order of the 14th of September 1903 whereas, in fact, no appeal would lie from that order. The facts are shortly these :—An order in execution, being a decree under the Code, was passed on the 20th of November 1902, and in supplement of it a further order as to costs was made on the 20th December 1902. On the 3rd of August 1903, the present respondent before us, considering himself aggrieved, applied, under section 623 of the Civil Procedure Code, for a review of judgment.

Notice was issued to the opposite party and the application for review was heard with the result that the Judge, after disposing of certain technical objections, proceeded, as he indicated, to deal with the case on the merits, and having done so, he rejected the application for review with costs on the 14th of September 1903.

The present respondent appealed from this order, and the lower appellate Court on appeal passed the order of which complaint is now made.

It is argued for the appellant before us that the order of the 14th of September 1903 was under section 629 a final order inasmuch as it was one rejecting the application, and the only order from which an appeal could lie was the order of the 20th of

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December 1902, and an appeal from that, it is said, would be barred by limitation.

The whole point is whether the adjudication on the 14th September 1903 was made upon a re-hearing or was merely an order for rejection. In order to determine this point we must have regard to the various stages through which an application for review may pass. It commences ordinarily with an *ex parte* application under section 623 of the Civil Procedure Code. The Court then may either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or rejected; and it is obvious that the hearing of this rule may involve, to some extent, an investigation into the merits. If the rule is discharged then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached; the case is reheard on the merits and may result in a repetition of the former decree or in some variation of it. Though in one aspect the result is the same whether the rule be discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for, in the latter case, the whole matter having been re-opened, there is a fresh decree. In the former case the parties are relegated to, and still rest on, the old decree. The order appropriate to a discharge of the rule is the rejection of the application as provided by section 626, Civil Procedure Code; and it is impossible to read Mr. Chandulal's judgment without being impressed with the idea that he designedly chose his language so as to bring his order within section 626. His order is "the application for review is rejected with costs," and our opinion is that Mr. Chandulal's order was one passed in the second stage of the review proceedings on the hearing of the rule for a review, and not one in the third stage on the re-hearing of the whole case.

It follows from this that no appeal lay from the order of the 14th of September 1903, and, as we have already indicated, that the proper procedure would be an appeal from the order of 20th December 1902.

The difficulty in the way of an appeal from that order is that any appeal now must be considerably out of time. But that is a defect which can be excused, if sufficient cause be shown, but

it cannot be excused by us as we are not the proper Court to entertain that application.

Mr. Shah has conceded, for the purpose of avoiding complication and additional expense, that the appeal to the District Court of Ahmedabad should be treated as an appeal from the order of the 20th December 1902, and not from that of the 14th September 1903. This to some extent simplifies the matters, and the proper order for us now to pass is that we reverse the decree of the District Court of Ahmedabad, and send back the case in order that it may be there determined whether on the footing of the appeal being one from the order of the 20th of December 1902, it is one which should be admitted.

The costs in the lower Court and in this Court will abide the result.

Decree reversed and case sent back.

G. B. R.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

VADILAL SAKALCHAND AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* G. F. BURDITT AND COMPANY (ORIGINAL DEFENDANTS), RESPONDENTS.*

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February 20.

Trade mark—Seller's design—Rights of manufacturer—Partnership—Dissolution—Partner continuing the business—Right to sue in respect of trade mark.

In the year 1892 M designed a label for goods ordered by his firm C. J. & Co. from J. F. A. & Co., the London manufacturers. The label consisted of a youth and girl in fancy dress and goods bearing the label became known in Bombay and up country as "Jori Mal."

By M's request the name of C. J. & Co. was printed on the border of the label in Persian and Gujaráti characters.

In 1897, M's partner having retired from the firm, M, the 4th plaintiff, continued the business of C. J. & Co., with the other plaintiffs, under the name, style and firm of V. & Co.

* Suit No. 205 of 1903, Appeal No. 1371.

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V. & Co. then ordered goods bearing the label from B. W. A. & Co., in London, instructing them to place on the border of the label, the name of their firm, V. & Co., in English, Persian and Gujarati characters.

In 1898, B. W. A. & Co., having become insolvent, the plaintiffs imported goods, without the label, from B. & Co., the defendants, who had taken up the business of B. W. A. & Co.

In 1899, the plaintiffs requested the defendants to arrange, if possible, to send out the goods under the "Jori Mal" label.

In 1900, the defendants, having purchased from B. W. A. & Co. their rights under the label, proceeded to place it on goods manufactured for and sold by them, leaving the border of the label blank, or inserting on the border, their own name, or, by special request, the names of the constituents, by whom the goods were ordered.

It was not expressly agreed, that B. W. A. & Co. should not supply goods under the label to constituents other than the plaintiffs.

The lower Court held, *inter alia*, (1) that the plaintiffs had lost their right to the exclusive user of the label as against the defendants, and (2) that the plaintiffs were not entitled to the rights, if any, of the firm of C. J. & Co., to the label.

On appeal, by the plaintiffs,

Held, the plaintiffs have failed to establish an exclusive right to the label.

In the absence of contract, a seller of goods has no exclusive right to a mark, which merely denotes goods which he sells, even though he may have designed the mark himself.

Such a mark may be a mere quality mark, indicating the reputation of the goods, irrespective of the reputation of the seller.

Obviously every trader being entitled, if not bound, to state truthfully the quality of the goods he sells, no one trader can restrain any other from exercising that right by a mark truthfully indicating quality. For neither of the two grounds for protection exists in such case. His reputation is not injured and no deception is practised on the public.

To give an exclusive right there must be something further. The mark must amount to a representation that the quality is wholly or in part due to and guaranteed by some person or persons concerned in or connected with the origin or history of the goods. In such cases the public are invited to rely on the reputation of the persons denoted, and no other person can, without their authority, make such representation. It is a question of evidence in each case, whether there is false representation or not.

Held, also,

A trade mark, belonging to a firm, would, in the absence of express provisions to the contrary, as part of the partnership assets, be available for any partner of that firm, carrying on that business.

Hirsch v. Jonas⁽¹⁾ followed, *Damodar Ruttonsey v. Hormusjee Adarjee*⁽²⁾ distinguished

(1) (1876) 3 Ch. D. 584.

(2) Unreported.

APPEAL from Chandavarkar, J.

In 1892, Maneckchand Morarjee, one of the plaintiffs in this suit, designed a label for goods ordered by his firm, Chunilal Jamnadas, from the London manufacturers, J. F. Aldridge & Co.

The label consisted of a youth and girl in fancy dress and goods bearing the label became known in Bombay and up country as "Jori Mal."

By the plaintiffs' request, the name of Chunilal Jamnadas was printed on the border of the label in Persian and Gujarati characters.

In 1896, the firm of Chunilal Jamnadas imported goods under the same label from B. Whalley Ashwell and Company in London.

In 1897, the firm having dissolved partnership, the plaintiff Maneckchand continued the business of Chunilal Jamnadas, in partnership with Vadilal Sakalchand, Runchordas Madhowji and Amilal Jadowji, the other plaintiffs, under the name, style and firm of Vadilal Sakalchand.

In 1897, the firm of Vadilal Sakalchand ordered goods under the label from B. Whalley Ashwell and Company, requesting them to place on the border of the label, the name of their firm, in English, Persian and Gujarati characters.

In 1898, B. Whalley Ashwell and Company having become insolvent, the plaintiffs imported goods, without the label, from the defendants Burditt and Company, who had taken up the business of B. Whalley Ashwell and Company.

In 1899, the plaintiffs requested the defendants to arrange, if possible, to send out the goods under the "Jori Mal" label.

In 1900, the defendants purchased from B. Whalley Ashwell and Company, their rights under the label.

The defendants then proceeded to place the label on goods manufactured and sold by them, leaving the border of the label blank, or placing on the border, their own names or, by special request, the names of the constituents, by whom the goods were ordered.

On the 2nd April, 1903, the plaintiffs filed a suit (being suit No. 205 of 1903) against the defendants, praying, *inter alia* :—

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(1) That the defendants may be restrained by injunction from importing into India or selling in India any goods on which is affixed the label aforesaid or any other label, which is a colourable imitation of the plaintiff's label aforesaid.

(2) That the defendants may be ordered to account for and pay to the plaintiffs all profits made by them out of any goods imported or sold by them, bearing the said label.

(3) That the defendants may be ordered to pay the costs of this suit.

Jardine, with him *Lowndes*, for the plaintiffs:—

The plaintiff's object in getting the Lady and Gentleman ticket was to distinguish his goods, from those of other merchants. The conception came from Maneckchand, the 4th plaintiff, and the plaintiffs never used any other label. Ashwell's object in printing similar tickets in blank, was to use them, if successful, through other indentors, if the plaintiff's orders fell off. The plaintiff was not aware of this fact and is not bound by it.

The firm of Chunilal Jamnadas dissolved partnership in 1897. For the effect of this see *Anookool Chunder Nundy v. Queen-Empress*⁽¹⁾ and *Sebastian on Trade marks*⁽²⁾. The right to the label passed to Maneckchand, who continued the business.

The expression "their old label" in the correspondence shews, that the plaintiffs asserted ownership, after Ashwell's insolvency. The fact, that they did not object to the blank label is not material, because the label itself was a sufficient indication, that the goods were those of the plaintiff.

The label admittedly has a reputation and the defendants are not entitled to place goods, under the Lady and Gentleman ticket, in the same market as the plaintiff.

Robertson, with him *Branson*, for the defendants.

The label was the property of Ashwell and was partly designed by him. Even assuming that the label was originally the property of Chunilal Jamnadas, which is denied, the plaintiff would not, in the absence of an assignment, have any right in respect of it. Again the plaintiff, as the mere seller of goods, could not in any event claim an exclusive right against the manufacturer. See *Robinson v. Finlay*. *Ward v. Robinson*.⁽³⁾

⁽¹⁾ (1900) 27 Cal. 776.

⁽²⁾ pp 106, 110 (4th Edn.).

⁽³⁾ (1877) 9 Ch. D. 487.

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After the insolvency of Whalley Ashwell & Co. in 1898, the plaintiffs imported goods from the defendants without the label. The correspondence between them shews that exclusive ownership was never alleged by the plaintiffs, at this time. Having, by their silence, induced the defendants to purchase the ticket, they are estopped from setting up an alleged right of ownership now.

The defendants are the successors of B. Whalley Ashwell & Co. and have acquired through them, the right to place the label on their goods.

CHANDAVARKAR, J. (after stating the facts). To sum up:— B. W. Ashwell & Co. had some print works exclusively engaged to them for India. They had piece-goods of different kinds manufactured for them and exported them to wholesale dealers in Bombay. Several of the dealers selected their own goods and the firm Chunilal Jamnadas made their selection. B. W. A. & Co. were asked by Chunilal J. to reserve the lady and gentleman ticket for them exclusively, and sent a design compounded of the two separate pictures of B. W. A. & Co. B. W. Ashwell & Co. agreed to that, and the goods, sent to that firm exclusively, had the ticket stamped on them, with the name of Chunilal J. printed on the borders, in the English, Gujaráti and Persian characters. At the same time, B. W. Ashwell & Co. put two small tickets by the side of the ticket. The goods imported came to be known in the Bombay market as "Jori Mal" and to be identified with Chunilal Jamnadas. That firm stopped in October 1897; it did not sell its good-will to any one; nor did it sell or purport to sell or assign its right to, or interest in the ticket. Had Chunilal Jamnadas any exclusive right of the kind now claimed by the plaintiffs, it is not probable that the firm would have let so valuable an asset as the mark alone. The plaintiffs then commenced to do business with B. W. Ashwell & Co., in the same way that Chunilal Jamnadas had done. B. W. Ashwell & Co. had to get the kind of piece-goods wanted by the plaintiffs manufactured and they (B. W. Ashwell & Co.) had engaged certain print works exclusively for their use. This must have been done by B. W. Ashwell & Co. on their own risk and responsibility. The plaintiffs imported a

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certain class of goods out of those exported by B. W. Ashwell & Co., who exported them to none else under the agreement with the plaintiffs. There were risk and expense on either side. It was under these circumstances that the lady and gentleman ticket was used, when B. W. Ashwell & Co. became bankrupt, and the defendant took up their business. Ashwell would not let the defendant use his tickets. The defendant had therefore to deal with the plaintiffs without the lady and gentleman ticket and was a long time arranging for Ashwell's permission to use the old tickets. The plaintiffs kept on asking for the use of the old ticket on their goods, but, at the same time, they were content to receive the goods from the defendant, with other tickets on. They knew, what the hitch was, and that the defendant was trying to come to an arrangement with Ashwell. The plaintiffs, therefore, waited without setting up an exclusive right. On one occasion the plaintiffs received from the defendant a consignment, stamped with the lady and gentleman ticket on the goods, with B. W. Ashwell & Co.'s name on it. And the goods so received were sold by the plaintiffs. For some time after the defendant had succeeded in getting an assignment of the right to use the old tickets from Ashwell, the plaintiffs continued to deal with the defendant and then broke off. And now having left the defendant in the lurch they say, that the lady and gentleman ticket which had been used on the goods imported by them, first from B. W. Ashwell & Co., and afterwards from the defendant, has become exclusively theirs and that the defendant has no right to use it, because they assert that it is their mark, identifying solely the goods imported by them. The facts of the case, as I have stated them, and as they are, in my opinion, proved by the evidence, both oral and documentary, are wholly against the plaintiffs' claim. The plaintiffs' conduct, during what I have called the "interregnum" — the fact that the firm Chunilal Jamnadas, when it dissolved, neither by conduct, nor words, showed that it had a right of exclusive user, the hesitant manner in which the witnesses examined for the plaintiffs spoke about the exclusive identification of the ticket with the plaintiffs' name, while admitting the user by plaintiffs of other labels for their goods; the absence of

any testimony from up country dealers and the non-production of their letters; the fact that B. W. Ashwell & Co. took care to attach two smaller tickets to the tickets in question with their name on them making the design a compound matter, in which they were interested jointly with those, whose names were printed on the blank borders of the picture; the fact, moreover, that B. W. Ashwell & Co. on the one hand had certain print works engaged exclusively by him for India, which meant the undertaking by them of considerable risk and expense, that on the other hand, the plaintiffs selected a certain class of goods for sale by them in the Bombay market and imported them from B. W. Ashwell & Co., who reserved those goods exclusively to plaintiffs in that market, and that the lady and gentleman ticket came, under the circumstances, to be reserved by B. W. Ashwell & Co. for the use at first of Chunilal Jamnadas and then of the plaintiffs—all this, in my opinion, leads to no other inference, than that the ticket was not, and has not become the exclusive property of the plaintiffs' goods. I attach no importance to the defendant's statement made in his deposition that he "assumes" that the ticket is well-known in the Bombay market in connection with the plaintiffs' firms. I cannot act upon that statement as an admission, when it is guardedly put forward as an assumption. Upon the view most favourable to the plaintiffs, on the circumstances of the case, the plaintiffs' right cannot be higher than this, that the ticket was the joint concern of the parties, as long as they dealt with each other, and that when they ceased so to deal, each was at liberty to use the mark for his goods, provided he did not use the name of the other on the ticket. This view of the case seems to me to best fit in with the conduct of either party. It explains, why plaintiffs acted as they did, during the period of the interregnum, and why they have failed to put into the witness-box some of their up country customers, or to produce their letters to show that the trade mark is known in the Indian market as exclusively theirs. It explains, on the other hand, when plaintiffs ceased to deal with the defendant and began to import goods through Patuck from some one else using the lady and gentleman ticket, why the defendant took no steps to assert his exclusive right.

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The present case seems to me to resemble somewhat *Robinson v. Finlay. Ward v. Robinson*⁽¹⁾ and is within the incidence of the principle of that decision. Here, as there, at the time of the commencement of the relations between the parties, no one of them had any right to the trade mark, whatever, as connected with the piece-goods exported. Here, as there, the trade mark was adopted as the result of joint consultation between the parties. There it was proved, that the goods were quoted in the market as "Robinson's"⁽²⁾ first, as here, the goods are alleged to be quoted as the plaintiffs'. In *Robinson v. Finlay*⁽³⁾, James, L. J., said:—"The case is not like one depending on the relation of master and servant, or principal and agent, but is more like a partnership; that is to say, the mark was adopted by persons joined in a matter in which they were interested jointly, not as master and servant, but by way of a partnership. The *onus probandi* is thrown upon the plaintiff in each case to prove that he has that monopoly and sole right which he alleges to use the marks or combination of marks, and that the defendant is unlawfully using the same." Baggallay, L. J., said:—"It being clear upon the evidence that the designs were designs... in which all three were interested, it follows that, upon the termination of that adventure, none of the three could claim any title against the other." Bramwell, L. J., said:—"Here was a compound matter which the parties agreed to, and upon coming to the arrangement which they did come to, they made no provision as to what should happen when that arrangement ceased to exist between them, and the consequence is that each party must stand upon what one may call his natural rights under the circumstances, that is to say, that each may do what he is not forbidden to do."

The findings on the issues were, *inter alia*, as follows:--

(1) The plaintiffs have been in the habit of importing into Bombay and selling piece-goods distinguished by the label annexed to the plaint, as alleged, but the label on the goods had two smaller tickets attached to it, containing B. W. A. & Co's name till November 1898, besides the plaintiffs have also imported

(1) (1878) 9 Ch. D. 487.

(3) (1878) Ibid p. 498.

(2) (1878) Ibid p. 489.

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ed the same quality of goods stamped with other labels and sold them as goods of their import and merchandise.

(2) The goods bearing that label have acquired a reputation in the Bombay market as "Jori Mal," but it is not proved that plaintiffs' goods have acquired that reputation, the evidence showing that they have sold the goods stamped with other labels.

(3) The conduct of the defendants is not calculated to deceive the purchasers into the belief, that the defendants' goods are the plaintiffs'.

(4) The plaintiffs are not entitled to the rights, if any, of the firm of Chunilal Jamnadas to the said label.

(5) The design was a suggestion of the plaintiffs borrowed from two separate tickets of B. W. Ashwell and Company. The ticket is known as the lady and gentleman ticket.

(6) The plaintiffs have lost their rights to the exclusive user of the ticket as against the defendant.

(7) There is no estoppel.

The suit was dismissed with costs.

The plaintiffs appealed.

The following were the grounds of appeal *inter alia* :—

(1) That the learned Judge erred in holding that the tickets had not acquired reputation in connection with the plaintiffs' goods.

(2) That the learned Judge erred in giving weight to the evidence that the plaintiffs sold goods under tickets, other than the lady and gentleman ticket.

(3) That the learned Judge ought to have held that the 4th plaintiff Maneckchand having been partner in the firm of Messrs. Chunilal Jamnadas and his partner Chunilal Sakalchand on the dissolution of the firm of Chunilal Jamnadas not having continued the business in the goods with the lady and gentleman ticket, abandoned his right to use the same, and the said 4th plaintiff having started the plaintiffs' firm as successor to the said firm of Chunilal Jamnadas and having continued to use the said ticket was or became entitled to the exclusive use of the ticket in question as against his said former partner Chunilal Sakalchand.

(4) That the learned Judge was wrong in holding that B. Whalley Ashwell and Company had any right of using solely or jointly with the said Chunilal Jamnadas or with the plaintiffs the lady and gentleman ticket complained of.

Lowndes, with him *Inverarity* and *Jardine*, for the appellants (plaintiffs):—The case of *Robinson v. Finlay*⁽¹⁾ does not apply. The public has relied upon the reputation of the plaintiffs for

(1) (1877) 9 Ch. D. 487.

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their general business capacity and integrity. The mark, which attracts custom, by indicating such reputation is entitled to protection, see *Damodar Ruttonsey v. Hormusji Adarji*⁽¹⁾. In the present case there was a joint adventure as in *Re Jones Trade Mark*⁽²⁾ but the correspondence shews that the contract was, that the ticket should be the exclusive property of Chunilal Jamnadas.

Chunilal Jamnadas acquired a great reputation under the ticket. When the firm was dissolved, the retiring partner did not claim it. That partner's interest in the trade mark accordingly passed to Maneckchand the 4th plaintiff, who continued the business, see *Sebastian on Trade Marks*⁽³⁾.

Branson, with him *Robertson*, for the respondents (defendants) :—This is not a case of registering, but of using a Trade Mark. The law is wider, with reference to user, see *In re The Australian Wine Importers, Limited*⁽⁴⁾. The case of *Hirsch v. Jonas*⁽⁵⁾ applies. The lady and gentleman ticket merely indicated that the goods were manufactured by the defendants. The plaintiffs, as the sellers, could not have an exclusive right to the ticket, see *Robinson v. Finlay, Ward v. Robinson*⁽⁶⁾. Even assuming that the plaintiffs were originally the owners, their conduct, after the insolvency of B. Whalley Ashwell and Company, estops them from setting up such ownership now.

Lowndes, in reply, cited *Massam v. Thorley's Cattle Food Company*⁽⁷⁾.

BATTY, J.:—In this case the plaint alleges that the plaintiffs have been in the habit for some years of importing into Bombay and selling piece-goods, distinguished by a particular label placed on each piece of cloth and on the outside of the wrappers; and that the plaintiffs' goods bearing the label in question have acquired a very great reputation in Bombay and up country and are known as the "Jori Mal" from the label. The principal feature of the label is a picture of a youth and girl, each in fancy costumes. The plaint proceeds to state that the plaintiffs

(1) Unreported.

(2) (1886) 53 L. T. (N. S.) 1.

(3) p. 106. (4th Edn.).

(4) (1889) 41 Ch. D. 278 at pp. 281, 282.

(5) (1876) 3 Ch. D. 584.

(6) (1877) 9 Ch. D. 487.

(7) (1880) 14 Ch. D. 748 at p. 761.

orders for goods sold with the label, were executed by Messrs. Ashwell & Co., whose successors in business are the defendants, and that recently the defendants have been importing and selling in Bombay piece-goods with a label which in its main features is an exact copy of the plaintiffs' label. This conduct, as calculated to deceive purchasers into the belief that the defendants' goods are the plaintiffs' well-known goods, and so to occasion great damage and loss to the plaintiffs, is characterized in the plaint as wrongful and forms the ground of this action.

The prayers in the plaint are (1) for an injunction restraining the defendants from importing and selling goods with the label in question or with any colourable imitation thereof, (2) for an account and recovery of profits made by such sales by defendants and (3) damages and such other relief as the case may require.

The label used by the plaintiffs is A to the plaint. That used by the defendants is B. On the plaintiffs' label the name of their firm Amilal Jadowjee and Premchand Wadilal appears in English, Gujarati and Persian on the borders at the top, bottom and side. The borders on defendants' label are left blank. In every other respect the two labels appear to be indistinguishable.

The defendants in their written statement alleged *inter alia* that the label referred to in the plaint was designed and printed by Messrs. Ashwell & Co. and that it was their property, was used by them on goods manufactured and sold by them and was placed by them on goods indented for by their constituents when so required, and that the borders were filled up with the names and addresses of constituents who wished it: that the plaintiffs' firm had such use of the ticket but without any agreement giving them any exclusive use thereof. The defendants also stated that Messrs. Ashwell & Co. ceased to do business and that as for about 18 months they refused to sell their tickets to the defendants except on one occasion, the defendants were unable to use the label in question, and that the plaintiffs during that period made no claim to the label as of right, but requested the defendants to obtain the permission of Messrs. Ashwell & Co. to the import of goods bearing that label and are thus estopped from disputing the right of the defendants as purchasers from

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Messrs. Ashwell & Co. of the right to use the label. The defendants further alleged that they bought from Messrs. Ashwell & Co. in June 1900, the exclusive right to the use of the label and are owners thereof and have never agreed to give the exclusive use of the ticket to plaintiffs. The written statement admits that the defendants after supplying goods to plaintiff with the label A to the plaintiff, cannot allow other dealers to use that label but asserts the right to use the ticket B with the borders filled in with their own or any names other than the plaintiffs, and also asserts that they and Messrs. Ashwell & Co. have used the label in question on many descriptions of goods sold and imported by them and not only on one particular class of goods.

[His Lordship here referred to the issues, the findings upon them recorded by the lower Court and the grounds of appeal, and then went on :—]

On one point, not set forth in the plaintiff, counsel for the appellants laid great stress in arguments. It is this. One of the present plaintiffs, Maneckchand Morarjee, was from 1892 to 1897 a partner in a firm trading under the style of Chunilal Jamnadas and alleges that it was in 1892, when he was a member of that firm, that he selected the label in dispute to be attached to and sold with goods for which he indented through Aldridge Salmon & Co. The appellants' account of this is confirmed by Exhibit T (p. 77) and by the evidence of T. R. Parukh, then salesman for Aldridge Salmon & Co., and does not appear to be displaced by the contention for respondents that Exhibit T relates solely to tickets received from Ashwell & Co. For the passage referring to the return of selected specimens does not necessarily apply to the orders of Chunilal Jamnadas, and the specific description of his requirements suggests that the device he wanted was not one already supplied from England for approval. Moreover there is no evidence that the specimen labels Aldridge Salmon & Co. had received were obtained from Messrs. Ashwell & Co. It may therefore be taken that the use of the device was one initiated by Morarjee. Counsel for appellants thereupon contends that the goods sold with that label by Chunilal Jamnadas became associated with the reputation of that firm, and that Maneckchand Morarjee as a late

partner of that firm and continuing business on the same premises, is entitled to the benefit of the reputation so acquired in connection with such goods and that the finding of the lower Court to the contrary is erroneous.

The retiring partner in this case, it is urged, has not continued business on his own account and Manekchand Morarjee is therefore entitled to the benefit of the reputation which his firm had acquired. No argument has been adduced for the respondents to show that if Manekchand Morarjee is entitled to the exclusive use of the trade mark in dispute, any objection could be taken in this case to his instituting this suit in the name of the new firm of which he is a member. A trade mark belonging to a firm would in the absence of express provisions to the contrary, as part of the partnership assets, be available for any partner of that firm carrying on the business. *Robinson v. Finlay* ⁽¹⁾; *Condy v. Mitchell* ⁽²⁾; Sebastian on Trade Marks, pp. 105 *et seq* and cases there cited. It is not suggested that in this case any provisions to the contrary had ever existed and I therefore think that whatever rights the firm of Chunilal Jamnadas may have acquired in respect of the label in dispute, would, without formal assignment, be claimable by Manekchand Morarjee on behalf of his present firm.

The important question remains whether that part of the label to which the defendants deny the plaintiffs' right, indicates a reputation acquired for the goods by either or both of such firms. The name of the plaintiffs' firm on the label is the only part of it which defendants admit to have any connection with the plaintiffs' reputation. And if plaintiffs fail to prove anything further, the mere fact that the rest of the device was of their own selection or invention, would not advance their case beyond that of the plaintiff in the case of *Hirsch v. Jonas* ⁽³⁾. For in that case the plaintiff, a cigar merchant, who had ordered supplies of cigars from a Havannah manufacturer, had himself furnished the device which he requested the manufacturer to affix to each box supplied, and which the manufacturer placed on the side of each box with his own name added.

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(1) (1878) 9 Ch. D. 487. (2) (1877) 37 L. T. N. S. 208, 766.

(3) (1876) 3 Ch. D. 534; 45 L. J. Ch. 364; 35 L. T. N. S. 228.

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On the plaintiff bringing an action to restrain the manufacturer from selling any boxes having the label affixed, Sir George Jessel M. R. refused an injunction, observing that there was no contract that Genir, the manufacturer, should not supply cigars under this label to any one else. The concluding passage of his judgment runs as follows :—

“I can understand a man saying, ‘I am not the actual manufacturer of goods but the selector of goods, and my reputation for cleverness and selection is so great, that goods marked with a mark to show that they had been selected and approved of by me will fetch a higher price in the market.’ If *Hirsch* had put on the box ‘*Gloria de Inglaterra Havannah*’ cigars, selected by *Hirsch*,’ he might have had a case to prevent other people imitating that. It would show that the cigars selected were approved of by him. If he got a great reputation in that way, I can understand he would have a right of protection for that which indicates to the public that the cigars were selected and approved of by him. That is not his case. There is nothing on the boxes to show anything about *Hirsch* at all. All he says is that the trade knows this mark as denoting cigars sold by him, which I dare say it does. It appears to me at present that he has no case whatever, and there is no use my granting an injunction. I do not know whether he may make out a contract hereafter.”

Thus, in the absence of contract, a seller of goods has no exclusive right to a mark which merely denotes goods which he sells, even though he may have designed the mark himself.

Such a mark may be a mere quality-mark, indicating the reputation of the goods irrespective of the reputation of the seller.

Obviously every trader being entitled if not bound to state truthfully the quality of the goods he sells, no one trader can restrain any other from exercising that right by a mark truthfully indicating quality. For neither of the two grounds for protection exists in such case. His reputation is not injured and no deception is practised on the public.

To give an exclusive right there must be something further. The mark must amount to a representation that the quality is wholly or in part due to and guaranteed by some person or persons concerned in or connected with the origin or history of the goods. In such cases the public are invited to rely on the reputation of the persons denoted, and no other person can, without their authority, make such representation.

The only question then in this case is whether the device in the label B is a false representation of this last mentioned character. "It is a question of evidence in each case whether there is false representation or not." (*Burgess v. Burgess*⁽¹⁾ and Lord Herschell in *Reddlaway v. Banham*⁽²⁾). *Primâ facie*, the device itself does not purport to suggest any such representation. Being merely a picture of a youth and girl in fancy costume, the utmost it seems on the face of it to suggest in connection with the goods is that they may be used for the purpose of such or other costumes and will satisfy the public taste. It does not indicate any one as responsible for their attractiveness, much less that they are the better for being sold by any individual firm. It does not even indicate any individual firm. Unquestionably the legends on the margins of the label A do perform that function. But then those legends are expressly omitted from the label B and defendants disclaim all intention to use them.

But the appellants would contend that the pictorial part of the device is so identified in the mind of the public with the firm specified on the margins of label A as to form part and parcel of their commercial signature. It is of course a question of fact that could only be answered by evidence, whether the figures in fancy dress are so associated by consumers with plaintiffs' firm that taken by themselves they would be recognized as a pictorial supplement or duplicate of their trading style. It must be noted that in the plaint which I have already quoted, there is nothing to foreshadow the existence of any evidence to show that the reputation of the goods is in any manner or degree due to the connection of the plaintiffs' firm with their origin or history.

Paragraph 2 of the plaint states that the plaintiffs' goods bearing the said labels have acquired a very great reputation in Bombay and up country, and are known as the Jori Mal. The first sentence indicates a reputation due to the goods, not to the plaintiffs. The second suggests that the goods are enquired for not as the plaintiffs' goods, but simply as goods associated with a label indicating their attractiveness and suitability for picturesque costumes. The plaint makes no attempt

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(1) (1853) 3 De G. M. & G. 896.

(2) [1896] A. C. 199 at p. 210.

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to attribute the reputation of the goods to anything that the plaintiffs' firm has done. The inference that suggests itself is that the firm has derived a reputation for the goods, but not that the goods have derived their reputation from the firm. The plaint indicates nothing on the part of the firm as having raised the goods in public estimation and there is nothing in the allegations to show that the plaintiffs can claim more credit for the value attached by the public to the goods, than they could for the value attached to currency notes that may pass through their hands.

With regard to the evidence in the case appellants' counsel was constrained to admit that it was all equally bad. This is ascribed to the difficulty witnesses had in understanding what were the facts on which their evidence was required. But the question in issue was really a simple one, *viz.* what was the fact of which the purchasing public required to be satisfied when enquiring for the goods in question and of which the label is accepted as a guarantee. And unless the answer was that the public insisted on ascertaining that the goods were bought from the plaintiffs' firm, it would be valueless for the purposes of the claim. It was for the plaintiffs to show that any enquirers for the goods attached importance to that point. As observed by the lower Court no letters from up country constituents have been put in for this purpose. This is in itself a very significant fact. For it indicates that there is no evidence that any stress was laid on plaintiffs' connection with the goods by purchasers who did not deal directly with the plaintiffs and who if they were not indifferent on the point would presumably have insisted on it.

Purchasers in Bombay dealing with the firm direct, of course knew that plaintiffs sold the goods in question. But that did not satisfy them; and the evidence of the plaintiff Morarjee shows that customers objected to the goods when sold with another label—not on the ground that they were not plaintiffs' goods—but on the ground that they were of inferior quality. Thus the label was taken as a guarantee of quality, and indifference was shown to the fact that plaintiffs were the sellers. Another witness, Kessojee Sunderjee, distinctly says

"the term Jori Mal conveys to the purchaser the idea of chocolate goods, black and other kinds of chintz," that is it designates the quality and not the seller. A third witness, Meghji Jagji, says the ticket indicates the goods are "assal" (excellent).

Not a single witness cites an instance of the slightest importance being attached to the plaintiffs' connection with them as sellers. Some stress has been laid upon the admission of the defendant that he assumes the ticket has been identified with the plaintiffs. But this admission I think carries the plaintiffs' case no further than that of the cigar seller in *Hirsch v. Jonas*⁽¹⁾, where the mark in question was known as denoting goods which the plaintiff sold.

It is argued for appellants that the public relies upon the reputation of a selling firm for its general business capacity and integrity, as an assurance that full measure will be given; that the goods it sells will be in good condition and other similar advantages, and that marks indicating such a reputation perform the functions of a signboard in attracting custom and are entitled to the same protection.

But a signboard is localised and stationary and manifestly does not denote the repute attained in respect of any specific class of goods. It professes only to assert the repute attaching to the establishment in respect of all the goods in which it deals. It is for that purpose alone it is used by the seller and understood by the public, and it connotes no proprietary or exclusive right in the reputation of any particular goods but only the conduct of the firm in respect of all its goods alike. But the plaintiffs do not profess or claim so to use the pictorial device now in question, and a trade-mark, as it cannot exist in gross, is not capable of being so used and understood. The plaintiffs do not claim that they use the same device on all the goods they sell, so as to denote merely that they sell the goods and that they alone are entitled to the credit for the way they carry on the business of selling. They claim the mark as asserting a something in favour of this particular class of goods implying that the qualities for which those specific goods themselves stand in good repute are in some way due to the plaintiffs' exertions. If the plaintiffs used the

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(1) (1876) 3 Cl. D. 524.

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same mark on all the goods and packages they send out, they might then reasonably claim that the public knew the mark only to mean that these goods are sold by and can be bought from the plaintiffs, and the public could attach to that representation whatever value the plaintiffs' reputation as salesmen might justify. But when plaintiffs ostensibly reserve the mark for one set of goods alone, they claim a reputation in respect of those goods apart and distinct from their own general reputation as sellers. And neither their plaint nor their evidence asserts any such special reputation in any way connecting them exclusively with the merits claimed for the goods. It would be very different if the exclusive right to the mark were claimed on the ground that it truthfully indicated the plaintiffs' reputation, not for their own general business, but for their special connection with the repute of the goods. But the grounds above considered do not claim for plaintiffs any credit for the manufacture, importation or selection of the goods or on account of any exclusive right they have to sell them. The plaint it is true alleges that the plaintiffs have imported the goods. But neither the plaint nor the label B nor the arguments of counsel can suggest that the goods are any better on that account or that the public are informed of that fact by the label B, or are in any way affected by it.

Appellants' counsel has referred us to the case of *Damodar Ruttonsey v. Hormusji Adarjee*⁽¹⁾, an unreported case, decided by Mr. Justice (afterwards Sir Arthur) Strachey in the first instance and confirmed on appeal by Sir Charles Farran and Mr. Justice Fulton. But that case is very clearly distinguishable from the present and that in the most essential points. For, in the first place, it was held in that case that the plaintiff with the knowledge and assent of Wills, the manufacturer, represented the arrangement between them as giving him (the plaintiff) an absolute and independent right to use the designs against all other persons including Wills himself. The correspondence proved that Wills assented to this view of the agreement. The appellate Court held the defendants "tacitly admitted the plaintiffs' contention that they (defendants) had no right to use the brands under any

(1) Unreported.

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circumstances." In the present case, however the plaintiffs allege no contract express or implied as the basis of their claim. In the next place Sir Arthur Strachey's judgment in the case cited, lays great stress on the part the plaintiffs took in directing and regulating the preparation of the goods. "The cigarettes," says Sir Arthur Strachey, "*were selected by the plaintiff in the sense that he prescribed both by description and by sample, the kind and quality of tobacco and the size and make of the cigarettes and from time to time suggested improvements both in quality and make.*" And again: "The popularity of the cigarettes is, in my opinion, due entirely to the exertions of the plaintiff, who is one of the greatest importers of tobacco in India, who has the most extensive experience of the tastes of native smokers, who has given the cigarettes the advantages of name and design which his experience told him would probably attract customers... He has thus become *known* everywhere as their sole importer." Moreover the evidence of dealers was said to be conclusive that it was the importer and not the manufacturer on whom they relied. So in the appellate Court's judgment Sir Charles Farran said "Not only did the plaintiff give directions as to the kind of tobacco to be used in the cigarettes and as to the kind of boxes in which they were to be placed and as to the device which the boxes were to bear but he also corrected from time to time faults which Wills and Company fell into in manufacturing and packing the cigarettes for him." And Mr. Justice Fulton observed: "the plaintiff's name had become associated in the public mind with the importation of cigarettes bearing the device, &c." "To the great body of purchasers the essential fact was that these were cheap cigarettes which suited their taste and *were imported* by the plaintiffs under the devices, &c." These findings in my opinion very clearly differentiate the case cited from the present, in which plaintiffs have failed both in showing that the public relied upon their good name as importers, selectors or sellers, and also in suggesting any connection between themselves and these particular goods on which the public could have relied as a guarantee of the goods. The evidence in this case at most shows that the goods, first during the time of Chunilal Jamnadas and afterwards in the time of the present firm, acquired a reputation in

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the market as Jori Mal; and the bare fact that the name of either or both of those firms had become known as the name of persons who sold the goods in question, is an utterly insufficient ground for a claim to the exclusive right to a label which on its face indicates only the use for which the goods are suitable, and which has not been shown by evidence to be understood in any other sense by the public. No authority has been cited to us for the position that a seller merely because he sells goods is entitled exclusively to the reputation which the goods have acquired.

The remarks of Lord Herschell in *Birmingham Vinegar Brewery Co. v. Powell*⁽¹⁾, to which we have been referred, have no bearing on this case, but treat of the very different rights of the manufacturer of goods. In the view taken of the plaintiffs' connection with the piece-goods sold by him, it is unnecessary to discuss the bearing and value of the evidence recorded as to the inaction of the plaintiffs when the labels now claimed by them were withheld by Ashwell and Company. It suffices for the decision of this particular case that the plaintiffs have failed to show the label in dispute to be a representation that the goods to which it is attached are goods which owe their reputation in any sense or degree to the plaintiffs. For these reasons the decree of the lower Court is confirmed and the appeal is dismissed with costs throughout.

JENKINS, C. J.—I concur.

Decree confirmed.

Attorneys for appellants:—*Messrs. Bicknell, Merwanji and Romer.*

Attorneys for the respondents:—*Messrs. Crawford, Brown & Co.*

A. H. S. A.

⁽¹⁾ [1897] A. C. 710.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

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March 9.

RAMAPPA BHIKAPPA (ORIGINAL PLAINTIFF), APPELLANT, v. GANPAT ABA DHOLE AND ANOTHER (ORIGINAL DEFENDANTS 1 AND 3), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 17 and 20—Suit against several defendants—Some defendants residing outside the jurisdiction of Court—Objection—Earliest opportunity—Acquiescence in the institution of the suit.

Plaintiff filed a suit against three defendants in the Court at Sirsi. Defendant 1 lived within the jurisdiction of that Court and defendants 2 and 3 lived within the jurisdiction of the Court at Barsi. Plaintiff did not apply under section 17 of the Civil Procedure Code (Act XIV of 1882) for leave to sue defendants 2 and 3; on the other hand, those defendants, though they had taken an objection in their written statement that the Court had no jurisdiction, did not apply under section 20 of the Code.

The Sirsi Court allowed the claim against defendants 2 and 3 who did not reside within its jurisdiction.

On appeal by defendant 3 the District Judge set aside the decree on the ground of want of jurisdiction and ordered that the plaint be returned for presentation to the proper Court.

The plaintiff having appealed against the said order,

Held, reversing the order, that defendants 2 and 3 not having made any application under section 20 of the Civil Procedure Code (Act XIV of 1882), they must be deemed to have acquiesced in the institution of the suit and the suit could not now be said to have been improperly instituted against them in the Sirsi Court.

APPEAL against an order passed by E. H. Leggatt, District Judge of Kárwár, setting aside the decree of G. N. Kelkar, Subordinate Judge of Sirsi, and directing the return of the plaint for presentation to the proper Court.

The plaintiff filed a suit against three defendants in the Court of the Subordinate Judge of Sirsi for taking accounts with respect to goods supplied to the defendants and for the recovery of the balance that might be found due to him. In the plaint defendant 1 was described as living at Sirsi and defendants 2 and 3 as living at Barsi.

Defendant 1 answered that he was not liable to the claim.

* Appeal from order No. 16 of 1904.

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Defendants 2 and 3 contended, *inter alia*, that as they were residents of Barsi, the Sirsi Court had no jurisdiction to entertain the suit so far as they were concerned.

The Subordinate Judge found that he had jurisdiction to entertain the suit and allowed the claim to the extent of Rs. 3,057-4-6 against defendants 2 and 3, dismissing it as against defendant 1.

On appeal by defendant 3 the Judge held that the Court at Sirsi had no jurisdiction to entertain the suit. He, therefore, set aside the decree and directed that the plaint be returned to plaintiff for presentation to the proper Court.

The plaintiff preferred a second appeal against the said order and pending the second appeal the name of respondent 2 (defendant 2) was struck off.

Nilkanth A. Shiveshvarkar for the appellant (plaintiff).

P. P. Khare for respondent 1 (defendant 1).

Sumitra A. Hattayangdi for respondent 3 (defendant 3).

JENKINS, C. J. :—The present suit is brought in the Sirsi Court against three defendants, of whom one resides within the local limits of the Sirsi Court jurisdiction, the other two within that of the Barsi Court.

The Barsi defendants contend that the Sirsi Court has no jurisdiction so far as they are concerned.

But section 17 of the Civil Procedure Code says that all suits therein referred to (and this falls within its operation) shall be instituted in a Court within the local limits of whose jurisdiction any of the defendants at the time of the commencement of the suit actually and voluntarily resides, provided that either the leave of the Court is given, or the defendants who do not reside or carry on business or personally work for gain acquiesce in such institution.

The plaintiff did not obtain the leave of the Sirsi Court.

The question is whether the Barsi defendants have acquiesced. In their written statement they took an objection that there was no jurisdiction. But they made no application under section 20 of the Civil Procedure Code. The last paragraph of that section provides that every application for stay of proceedings thereunder shall be made at the earliest possible opportunity, and in

all cases before the issues are settled, and any defendant not so applying *shall be deemed to have acquiesced* in the institution of the suit.

No application was made under section 20. Therefore, the Barsi defendants must be deemed to have acquiesced in the institution of the suit, and the suit cannot now be said to have been improperly instituted against them in the Sirsi Court.

We therefore reverse the order of the District Judge and send back the case to be determined on the merits.

Costs of this appeal will be costs in the suit.

G. B. R.

Order reversed.

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ORIGINAL CIVIL.

Before Mr. Justice Batchelor.

MOTILAL PARTABCHAND, CARRYING ON BUSINESS IN THE NAME OF KHUSALCHAND PARTABCHAND (PLAINTIFF), v. GOVINDRAM JEYCHAND, CARRYING ON BUSINESS IN THE NAME OF RAMBUX JEYCHAND (DEFENDANT).*

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April 3.

Wagering contracts—Agreement to pay differences—Surrounding circumstances—Form of contract not of moment—Contract Act (IX of 1872), section 30—Bombay Act III of 1865.

The law which is contained in section 30 of the Contract Act (IX of 1872) and in Bombay Act III of 1865, is that the Court must not only consider the terms in which the parties have chosen to embody their agreement, but must look to the whole nature of the transaction or institution, whatever it may be, and must probe among all the surrounding circumstances, including the conduct of the parties, with a view to ascertain what in truth was the real intention or understanding between the parties to the bargain. The actual form of the contract is of little moment, for gamblers cannot be allowed to force the jurisdiction of the Courts by the expedient of inserting provisions which might in certain events become operative to compel the passing of property though neither party anticipated such a contingency.

The Court should be astute to discover what in fact was the common intention of both parties, and should do all that is possible to see through the ostensible and apparent transaction into the underlying reality of the bargain.

* O. C. J. Suit No. 721 of 1903.

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SUIT to recover a sum of money from the defendant.

The plaintiff sued to recover Rs. 5,092-8-0 from the defendant, alleging that the defendant had, during the year 1901 A. D., entered into contract with the plaintiff for the purchase and sale of large quantities of linseed, that the defendant failed to carry out his contracts for delivery of 3,250 cwts. of linseed which became deliverable in September 1901, and that by reason of the defendant's breach of contract the plaintiff sustained damages amounting to Rs. 5,092-8-0.

The defendant, in his written statement, contended *inter alia*, that he did not enter into any contracts with the plaintiff, and that the alleged contracts if made at all were not real contracts but were made in respect of agreements of wager on the price of linseed and that it was not the intention of either the plaintiff or defendant that any linseed should be delivered under the said agreement but it was their common intention that differences only between the contract price and the price fixed by the punch on the due date should be paid and received.

Davar, with *Raikes* (acting Advocate General), for the plaintiff.

Robertson, with *Inverarity*, for the defendant.

BACHELOR, J.—The plaintiff and the defendant are Marwari traders in a large way of business, and in this suit the plaintiff claims Rs. 5,092-8-0 as damages for breach of contracts for the sale and delivery of linseed. The contracts in question are seven in number, Exs. A to G, ranging in date from 11th March to 7th May 1901, and purport to be forward contracts for the delivery of linseed between the 14th and 28th September 1901, that is, the Bhadarva *vaida* of the *Samvat* year 1957. The plaint sets out that, under these contracts, deducting a sale made by the plaintiff under the contract Ex. H, 3,250 cwts. of linseed became deliverable by defendant to plaintiff in Bhadarva 1957; that owing to defendant's failure to fulfil the contracts, plaintiff had suffered the damage above stated; and that though repeated demands for payment had been made the defendant failed to make any compensation to the plaintiff. In his written statement the defendant denied that he had entered into the alleged contracts with the plaintiff, and contended that if the said contracts were made by him, they

were mere wagering agreements unenforceable in law. It was pleaded, further, that the plaintiff had not called on the defendant to give delivery on the due date, and had never tendered the price of the linseed. Finally it was denied that the plaintiff had suffered the damage complained of or any damage, and the market rates of linseed adopted in the plaint were challenged by the defendant.

The following are the issues on which the parties went to trial :—

1. Whether the defendant agreed to buy and sell from and to the plaintiff linseed as alleged in para. 3 of the plaint ?
2. Whether, if so, the plaintiff ever demanded delivery of the said linseed ?
3. Whether the plaintiff was ready and willing to perform his part of the contract ?
4. Whether the plaintiff has suffered the damage alleged or any part thereof ?
5. Whether the said contracts, if entered into at all, were not wagering contracts ?

On the first issue—whether the defendant agreed to sell to the plaintiff the 3,250 cwts. of linseed—I am of opinion that the plaintiff has clearly established his case. The evidence shows, and I understand that the fact is not disputed, that at the time these contracts purport to have been made, the defendant's *munim* at Bombay was one Jagannath Mantri, and that in June 1901 he absconded from Bombay taking with him the books and papers of the firm. A warrant was obtained for his arrest, and, being subsequently induced to surrender, he was taken down to Hyderabad (Deccan), the defendant's principal seat of business, and was there tried and convicted. Now the contracts Exs. A to G are made on the usual printed form with manuscript additions, and purport to be signed by Jagannath Mantri for the defendant's firm. The witness, Subhanchand Sijanmal, who was then the plaintiff's *munim* but is no longer in plaintiff's employment, identifies the signature of Jagannath. It is true that he never actually saw Jagannath signing his name, but he was familiar with the signature and I cannot doubt that the identification is satisfactory. And the witness proves further, that, in accordance with the practice of his firm, the signatures were duly verified when the contracts were accepted. Of the seven contracts, Exs. A, B and E were

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made by plaintiff on behalf of his constituent Hiralal Ratanchand, Ex. C was made on behalf of Sangidas Bikhanchand, and Exs. D, F and G were entered into on the plaintiff's own behalf. In the plaintiff's *soda-vahi* (register of contracts) we have the corresponding entries Exs. I to O. I have no doubt that the books are correctly kept, and these entries corroborate Subhanchand's evidence as to the authenticity of the contracts. Further support to this part of the plaintiff's case is furnished by Exs. 4 and 5, the *khatas* of Hiralal and Sangidas, who are credited with the differences due to them. Then there is the evidence of the broker, Gopal Jenarayan, who upon this point is unshaken in cross-examination, who is fortified by the book entry Ex. Z, and who deposes that the contract Ex. C was made through him by the defendant and was signed by Jagannath in his presence. It is not suggested that the contract Ex. C can reasonably be put upon any different footing from the other contracts sued upon. Again we have the three contracts, A 7, which are admitted by defendant's witness Surajmal Nihalchand to be signed by Jagannath, and if these signatures be compared with the signatures on the contracts in suit, they will be found to agree.

Against all this evidence nothing tangible is even alleged by the defendant, who has not chosen to come to Bombay to defend this suit. In the opening paragraph of the written statement there is indeed a vague denial that these contracts were made, but, if the written statement be read as a whole, it would seem that this denial is a *pro forma* allegation and that the real defence was intended to be grounded on other considerations. And this view is strengthened by the course adopted in argument: Mr. Robertson, for the defendant, contending that the contracts, though made by Jagannath, would not be binding on the defendant. Of course it is perfectly competent to the defendant to rely upon alternative defences, but it is noticeable that an attitude of mere negation is the only position that the defendant can assume upon the question of the authenticity of Jagannath's signatures upon these contracts. In other words it is not alleged that any one could have forged Jagannath's signature; on the contrary, whatever misfeasance is imputed, is imputed to Jagannath himself, and the real argument is that,

assuming the signatures to be genuine, the contracts are not enforceable against the defendant. I find as a fact that the contracts in suit were signed by Jagannath. As to the contention that no obligation was imposed on the defendant by Jagannath's execution of these contracts, it is unfortunate in the first place that no hint of this defence is to be found in the written statement. Then it is to be observed that Jagannath was admittedly the defendant's *munim* for the Bombay business, and I need not seek to attach to the word *munim* any further significance than is conveyed by Mr. Robertson's own paraphrase of "managing agent." Whatever be the particular form of words chosen for a transaction, the fact is indisputable that for the purposes of the defendant's trade in Bombay Jagannath *was* the defendant. He was the defendant's agent and representative, whom the defendant held out as empowered to transact all business on his behalf. And, in spite of attempted denials on the plaintiff's behalf, the defendant's own *munim*, Chunilal Salegram, the deeds Exs. A5 and A6 produced by him, and the defendant's witness Surajmal Nihalchand prove incontestably that linseed was one of the ordinary articles of commerce in which the defendant's firm was dealing. As I have said, the defendant does not appear personally to resist this claim, and there is literally no evidence to suggest that these contracts, whatever may be their true character, were made by Jagannath either in excess of his authority or in violation of his master's orders. Mr. Davar, for the plaintiff, has commented upon the fact that certain books and letters of defendant's firm which should be produceable have not been produced, and though I think the importance of this circumstance may be easily exaggerated, it is not a matter which can be wholly overlooked. On the evidence it is, in my opinion, manifest that in entering into these contracts Jagannath was doing just that class of acts which he was ostensibly placed by defendant in Bombay for the purpose of doing. Nor is there any evidence to show that Jagannath was acting for his own benefit, as opposed to the benefit of his master. These facts being so, I can entertain no doubt that these contracts of Jagannath bind his principal, the defendant. Authority for this opinion is, I think, supplied by *Montaignac v.*

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Shitta ⁽¹⁾ and *Ruben v. Great Fingall Consolidated* ⁽²⁾. In this latter case Collins, M. R., cites and explains the passage, which he calls the *locus classicus* on the subject, from the judgment of Willes J. in *Barwick v. English Joint Stock Bank* ⁽³⁾. There the principle is thus stated:—"The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.....It may be said that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." Now it seems to me quite clear upon the facts of this case that the acts of Jagannath fall within this principle and are binding upon the defendant.

The second and third issues have not been separately argued at any length. They are really involved in the fifth issue which is the point upon which the whole case turns and which I shall discuss in a moment. Exhibits T and U, extracts from the plaintiff's Register, are adduced to prove that on the 25th and 27th September letters of demand were sent to the defendant, and for the purposes of this issue I will hold that these letters were really despatched. But it is certain that they did not reach the defendant, and in any case the capital question remains whether they demanded delivery or merely the payment of differences. I may say briefly that if the plaintiff succeeded on the issue as to wagering, I think he should succeed also on this issue, but not otherwise.

Similar remarks are applicable to the third issue. If the contracts were genuine commercial transactions, then I should hold that the plaintiff was ready and willing to perform his part. For his own affirmation to this effect need not be distrusted, and his cash book shows that on the due date he was in possession of ample funds wherewith to meet these contracts.

(1) (1890) 15 App. Cas. 357.

(2) [1904] 2 K. B. 712 (C. A.).

(3) (1867) L. R. 2 Ex. 259.

Postponing for a moment the fourth issue as to the damages claimable, I am now brought to the crucial question in the case, that is, whether the contracts in suit were *bona fide* dealings for the sale and delivery of goods, or were merely wagering agreements on differences, in other words bets upon the rise and fall of the market. This is a question of fact, and the only legal principle that I can call in aid is that admittedly the burden of proof lies on the defendant. In other respects this case, like every other case of facts, must depend on its own evidence, and a study of the reported decisions can afford little help except as indicating the classes of facts upon which the Courts have based their judgments. The law upon the subject which is contained in section 30 of the Contract Act and in Act III of 1865 is, I take it, this, that you must not only consider the terms in which the parties have chosen to embody their agreement: you must look to the whole nature of the transaction or institution, whatever it may be: and you must probe among all the surrounding circumstances, including the conduct of the parties, with a view to ascertain what in truth was the real intention or understanding between the parties to the bargain. The actual form of the contract is of little moment, for gamblers cannot be allowed to force the jurisdiction of the Courts by the expedient of inserting provisions which might in certain events become operative to compel the passing of property though neither party anticipated such a contingency: see *Universal Stock Exchange v. Strachan* ⁽¹⁾ per Lord Herschell, the decision of the Privy Council in *Kong Yee Ione & Co. v. Lowjee Nanjee* ⁽²⁾, and *Doshi Talakshi v. Shah Ujamsi Velsi* ⁽³⁾. Mr. Davar, for whose able and interesting address I desire in passing to express my acknowledgments, has insisted upon the indisputable distinction which exists between mere speculation and wagering, and has laid particular stress upon Farran J.'s judgment in *J. H. Tod v. Lakhmidas Purshotamdas* ⁽⁴⁾, which was approved by the appeal Court in *Doshi Talakshi's* case ⁽³⁾. But I am not aware that, except perhaps in one passage, Farran, J., has laid down the law

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(1) [1896] A. C. 166 at p. 173.

(2) (1901) 29 Cal. 461; 3 Bom. L. R. 476.

(3) (1899) 24 Bom. 227; 1 Bom. L. R. 756. (4) (1892) 16 Bom. 441.

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more favourably to the plaintiff than appears from the decisions to which I have already made reference. The particular passage in question is where the learned Judge says that the contracts are not wagering contracts "unless it be the intention of both contracting parties, at the time of entering into the contracts, under no circumstances to call for, or give delivery from or to each other." It may perhaps be doubted whether the phrase "under no circumstances," which does not appear to have been prominently brought before the Court of Appeal in *Doshi Talakshi's* case⁽¹⁾, is not rather an overstatement of the requirements of the law; and upon this point I would refer to the decision in *In re Gieve*⁽²⁾. That was a case where the contract in terms gave the buyer an option to demand delivery upon the payment of a small excess commission. It was argued that, even if the contracts were for the payment of differences only, the power in either party to turn them into real contracts by insisting upon delivery prevented them from being wagering contracts, but the Court of Appeal disallowed the contention: in the simple and decisive language of Lindley, M. R., such a contract does not escape the taint of wagering: "it is a gaming transaction plus something else": it was a bargain for differences plus an option to purchase. And the other Lords Justices were not less emphatic, Rigby L. J. observing:—"The very condition that it is to be optional for the purchaser to take up the stock shows that he is not bound to do so. He may do so if he chooses, by paying an extra sum, but not otherwise. This, therefore, is a contract for the payment of differences, and for nothing else. No doubt these conditions are put in to make it appear that they are intended to protect the selling broker, but I am glad to say they are not sufficient to blind this Court to the real nature of the transaction, which was that there was no intention whatever to deliver or accept stock."⁽³⁾ I must not be understood as affirming that Farran J.'s view is irreconcilable with these pronouncements; it is enough to say that I follow the law as it is stated by the Lords Justices. I may add that the authorities which I have cited appear to me to require that the Courts shall be astute to discover what in fact was the common

(1) (1899) 24 Bom. 227: 1 Bom. L. R. 786. (2) [1899] 1 Q. B. 794 (C. A.).

(3) [1899] 1 Q. B. 794 at p. 800.

intention of both parties, and shall do all that is possible to see through the ostensible and apparent transaction into the underlying reality of the bargain. With regard to *Sassoon v Tokersey*⁽¹⁾, where the defence of wagering was not allowed, I may observe that in that case the plaintiffs were mere brokers, and could not be assumed to know the intentions of the contracting principals; moreover it was held as a fact that 90 per cent. of the business was *bona fide* and that delivery to a very considerable extent took place. So in *Forget v. Ostigny*⁽²⁾, there was an actual purchase of the commodity, namely shares, and the defendant actually received dividends. As to *Ajudhia Prasad v. Lalman*⁽³⁾ that apparently merely follows the judgment of Farran, J., in *J.H Tod v. Lakhmidas*⁽⁴⁾, and it would seem that neither *Kong Yee Lone and Co. v. Lowjee*⁽⁵⁾ nor *In re Gieve*⁽⁶⁾ was brought to the consideration of the Court. The case of *Eshoor Doss v. Venkatasubba Rau*⁽⁷⁾ supports the view which I have taken, and, so far as a decision on one set of facts can influence a decision on another set of facts, makes against the acceptance of the present plaintiff's story. For the judgment of Parker, J., proceeds mainly upon the footing that the question discussed between the parties was the payment of differences, not the passing of the Government paper, and that, though the plaintiff had been long engaged in these transactions, he had only given delivery on one single occasion.

Now before going to the facts of this case I may interpolate here such notice as seems necessary of Mr. Robertson's contention that in any event the defendant is not answerable upon the suit of the plaintiff since plaintiff was a mere agent acting on behalf of up-country constituents whose claims have been settled. This remark, however, applies only to a part of the contracts in suit, and even as to them I confess my inability to discover its legal significance. In so far as the plaintiff was an agent, he was acting on behalf of undisclosed principals, of whom nothing was known until the witnesses in this case were examined. Here the

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(1) (1904) 28 Bom. 616: 6 Bom. L. R. 521.

(2) [1895] A. C. 318.

(3) (1902) 25 All. 38.

(4) (1892) 16 Bom. 441.

(5) (1901) 29 Cal. 461: 3 Bom. L. R. 476.

(6) [1899] 1 Q. B. 724.

(7) (1894) 17 Mad. 480 and (1895) 18 Mad. 306.

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plaintiff is suing as a principal and under section 230 sub-section (2) of the Contract Act it appears to me that his suit is competent.

With these observations I pass to consider the facts in the case in the light of the principles and authorities which I have set out above. In the words of Lord Hobhouse in *Kong Yee Lone's case*⁽¹⁾, I have to see whether the circumstances are such as to warrant the legal inference that the parties never intended any actual transfer of goods at all, but only to pay or receive money according as the market price of the goods should vary from the contract price at the due date. Now whatever else may be said, it must, I think, be admitted that in this case the question is not at first sight easy of solution, and it seems to me desirable to record that the conclusion at which I have arrived has been reached only after anxious consideration. On the evidence, taken as a whole, it cannot be seriously doubted that whatever be the character of these particular contracts, contracts of similar form were commonly made in the Marvari bazar in Samvat 1957 with no intention of giving or taking delivery of linseed, but with the sole object of gambling on differences. On the other hand, it must be confessed that this case does not present certain significant *indicia*, which in other cases have induced the Courts to concede the defence of wagering. In *Kong Yee Lone's case*⁽¹⁾, for instance, the transactions in question were extravagantly out of proportion to the genuine commercial resources of the parties, and in *Doshi Talakshi's case*⁽²⁾ the contracts were made at Dholera in Broach cotton, a commodity which never found its way either by production or delivery to Dholera. But here it cannot be pretended that the purchase of 3,000 odd cwt. of linseed was beyond the range of the defendant's capabilities or that the requisite quantity of the commodity could not easily have been obtained in Bombay. At the same time, these of course are not the only evidences of wagering, and I have to scrutinise all the circumstances of this case in accordance with the principles above enunciated. In the first place I would call attention to Ex. S, which is a statement prepared from the plaintiff's books showing his transactions in linseed for the years 1957 to 1959. I do

(1) (1901) 29 Cal. 461 : 3 Bom. L. R.
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(2) (1899) 24 Bom. 227 : 1 Bom. L. R.
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not attribute much weight to the dealings in 1959, for by that time the plaintiff may have reconsidered his position and may have determined to put himself on the right side of the law. Unfortunately the accounts for years prior to 1957 are not forthcoming, but as this result appears to be mainly due to the defendant's neglect to call for them in time, the absence of these books is not a matter which it would be fair to press against the plaintiff. Taking, then, the years 1957 and 1958, we find that during that period the plaintiff purchased for himself and for various customers nearly $3\frac{1}{2}$ lakhs cwts. of linseed, a quantity of which I shall not exaggerate the value in estimating it at Rs. 30 lakhs. In respect of these enormous purchases the only linseed actually delivered was the comparative trifle of $1,219\frac{1}{4}$ cwts. plus 1,000 cwts. in 1958. And this delivery was in itself exceptional, inasmuch as in 1957 it was made, not to Marvari purchasers upon a native *vaida* transaction, but to the European firm of Volkart Brothers for the April-May delivery. Having regard to Ex. A1 I am not prepared to disallow Mr. Davar's contention that this delivery was given in respect of a forward contract, but it must none the less be observed that the original contract has not been produced by the plaintiff. It appears, further, that the commission paid on this contract was at a different rate from the commission charged on contracts with Marvaris, and I do not think that this isolated and exceptional act of small delivery throws very much light upon the character of the plaintiff's general transactions. And in the same way the small delivery in 1958 appears also to have been made entirely to European firms. It may indeed be said that to a large extent the other contracts were discharged by cross-contracts entered into on the *pakki adat* system of commission agency; but still there remain the facts that business of this sort would be highly speculative and that there was a very large balance of deliverable linseed—*viz.*, 43,500 cwts.—which in fact was never delivered. It is not inconsistent with the defence that there may have been a small amount of genuine business done in the Marvari bazar, for that circumstance, when weighed against the enormous contracts not completed by delivery, would raise but a slight presumption in the plaintiff's favour. It is admitted that the only linseed which plaintiff

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actually had in hand during 1957 was a small quantity of 500 cwts., which bears an almost infinitesimal proportion to the amounts under contract. Ex. S shows that for the three *vaydas* in 1957 the balances deliverable by or to the plaintiff were 4,750 cwts. in Magser, 13,000 in Vaishak, and 5,750 in Bhadarva; and the plaintiff himself deposes that the sums due in respect of all these balances were settled by the payment of differences.

Next it is to be observed that the plaintiff has no godown or warehouse in which to store linseed. He says that he was in the habit of storing his goods with his three *mukadams*, but none of the *mukadams* is called to corroborate him, and the fact that he was and is without a storehouse possesses some significance in the light of all the other evidence.

The contracts in suit purport to be made "according to office terms," a somewhat obscure expression which is not explained by the evidence on the record. One witness indeed, Surajmal Nihalchand, interprets the words as meaning that if delivery is insisted on, it must be given; but he admits that he speaks only from hearsay, and I am not disposed to attach much importance to his view. But whether he be right or wrong, the plaintiff himself acknowledges that he for his part is entirely ignorant of the meaning of the phrase, and this ignorance has furnished Mr. Robertson with at least one argument which impresses me as sound. I think I need not do more than notice the overingenious theory that since this phrase is not defined, it is impossible to say that the contract has been broken; that is too refined a suggestion to bear much weight; but there is great force in the inference that the plaintiff's ignorance militates against the reality of the contracts. For in each case the contract bears on its face this limitation that it is made "according to office terms" a limitation which is also found in the hundreds of other similar contracts entered into by the plaintiff. But it is difficult to suppose, if these were genuine mercantile transactions, that the plaintiff would not have informed himself of the meaning of a limitation upon which might depend lakhs of rupees. On the other hand the difficulty at once disappears if we adopt the hypothesis that both parties were gambling, and that the actual form of the contract was a mere cloak to disguise their intentions.

Next I will consider the conduct of the parties, a very important guide in cases of this sort where one has to collect a common intention from *indicia* which must necessarily be somewhat imperfect or inconclusive. If these contracts were commercial transactions, delivery had to be made to the plaintiff by the 28th September 1901. Jagannath, the defendant's *munim*, had absconded in June, and I am quite clear that this absconding was perfectly well-known through the length and breadth of the Marvari Bazar. But the plaintiff stands by and makes no sign till, if we accept his own version, the 25th September. On that day and on the 29th September he says that he sent letters of reminder to the defendant's Bombay office, and he refers to the extracts from his Register. (Exhibits T and U). But the letters are not produced, though, the defendant's Bombay office being closed, they were returned to the plaintiff. This non-production seems to me an important matter, for if the letters were really written and were now produced, they might conceivably affect the case unfavourably to the plaintiff. Moreover, if we accept the Registers, they show that the letters to the defendant were some among a great many letters written to other clients of the plaintiff's firm upon similar contracts, contracts which were clearly discharged by the payment of differences. It is difficult to resist the suspicion that the letters themselves were mere calls to pay differences, and not demands for delivery. Then upon the evidence recorded I am satisfied that the plaintiff neither personally nor by deputy made any call upon the defendant's *munims* when they were in Bombay for the purpose of settling the defendant's affairs after the disappearance of Jagannath. Passing from these occurrences, the next sign of activity which plaintiff professes to have displayed is that, after the expiry of the due date, he instructed his Hyderabad *munim*, Lakhmichand, to dun the defendant for the debt. But no letter to or from Lakhmichand is produced, and Lakhmichand himself is not called as a witness. Thus the first authentic demand made by the plaintiff is that conveyed by his attorneys' letter, Exhibit V, dated 19th November 1903, that is, over two years subsequent to the accrual of the obligation. That letter demands the payment of Rs. 5,092-8-0 "due

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by you (the defendant's firm) to them at foot of your account with them in respect of linseed transactions." The letter does not suggest that any prior demand had ever been made. And it is important to notice how the sum claimed was arrived at. It is calculated not upon the difference between the agreed price and the market rate on the date of delivery, but on the difference between the agreed price and the rate fixed by the Marwari *panch* for the settlement of forward contracts. It is clearly proved that this rate is an arbitrary rate fixed by the Marwari dealers from 10 to 30 days after the expiry of the due date. In this particular case it is further established that the Marwari rate was appreciably lower than the market rate prevailing on the 28th September and Mr. Davar expressly takes the position that the Marwari rates are fixed low with the object of softening the losses of those who are on the wrong side of the market; so that it would have been to plaintiff's interest to adopt the market rate as the basis of his calculations. That he did not do so, and that he took the *panch* rate as the measure of his damages, seems to me to afford a plain indication that the parties never intended to pass property in actual goods. It may be said that this position is weakened by the fact that, in corresponding contracts in cotton, rates are also fixed by the Cotton Dealer's Association; but I do not think that there is any real analogy between the two cases inasmuch as the Cotton Association admittedly fixes its rates in the sole endeavour to arrive as near as may be at the actual market rates. Here, however, the rate arbitrarily fixed by the Marwari *panch* was only Rs. 9-11-9 per cwt., while the evidence proves, despite the plaintiff's disclaimer, that the real price was never under Rs. 10 about the dates in question. It must be acknowledged that the defendant's conduct has not been wholly satisfactory, and a great deal of Mr. Davar's criticism is not easy to answer. At the same time I am clearly of opinion that in this respect the case against the defendant looks a great deal worse than it really is. I will concede that it is probable that up to the last moment the defendant was uncertain whether he should resist this claim or not. But that, I think, is the worst that can be said, and that does not appear to me to be of very great

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significance. It is upon the record that these debts are reckoned as debts of honour in the Marwari Bazar, and I have no doubt that a Marwari merchant may find reasons for submitting to such demands quite apart from the question whether they are enforceable in law. Up to the last the defendant has omitted to appear at this trial, and his absence has rightly exposed him to rather severe comment at the hands of the learned counsel for the plaintiff. But it must be remembered that the defendant himself has no direct personal knowledge of the matters in dispute, and it does not appear that he would be in a position to give material evidence upon any points other than those which I have already decided in the plaintiff's favour. I think there has been some negligence and carelessness on his part, but I do not think that he can properly be charged with bad faith or with concealment of facts. Both his *munims* were put into the witness box, and both answered candidly and readily all the questions asked of them. Nor do I doubt the honesty or good faith of the instructions given to Mr. Robertson upon which the learned counsel professed himself eager to obtain any adjournment which might seem desirable to the Court for the purpose of securing further documentary evidence. In other respects the most damaging act of the defendant's was connected with his application to postpone the trial of the suit, for in this application a certificate was tendered from the Surgeon to H. H. the Nizám's Body-guard to the effect that the *munim* Chunilal was suffering from acute dysentery. On my refusing to grant an adjournment for more than a couple of days Chunilal came up from Hyderabad and has attended Court throughout the trial, being apparently in the best of health. Now in my opinion tortuous conduct of this kind deserves severe reprobation, but I should run the risk of doing injustice if I allowed such a consideration to influence me beyond a fair degree. Nothing is to be gained by shutting one's eyes to the fact, which I conceive is not likely to be disputed by any one of competent experience, that among the classes with whom I am dealing a dishonest pretence of this kind would be regarded merely as a piece of sharp practice not specially discreditable to the person employing it.

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The depositions of the witnesses may be considered shortly as, in my opinion, their general effect is too clear to call for any elaborate discussion. The most favourable construction which the plaintiff could ask me to put upon this evidence is that, under the contracts, if delivery had been insisted on, it would have had to be given. In my judgment, however, this proposition is not established; and even if it were established, then *In re Gieve*⁽¹⁾ indicates that it would not assist the plaintiff if the fact is—as I find the fact to be—that the giving or taking of delivery was never within the contemplation of either of the parties. The plaintiff himself admits that in the overwhelming majority of similar contracts made by him in 1957 and 1958 settlement was made, not by delivery, but by the payment of differences or by counter-contracts. He suggests, and his learned counsel adopts the suggestion, that this was a mere accident happening through particular and (I suppose) exceptional circumstances; but the evidence satisfies me, on the contrary, that this was the normal, regular and intended course of the transactions. The only witness whom plaintiff has elected to call by way of corroborating him is the broker Gopal Jenarayan, and he was summoned to prove only the genuineness of the contract (Ex. C.). In cross-examination, however, by Mr. Robertson, he so far favours the plaintiff's case as to say that if the seller has goods in his possession, he is bound to give delivery. But it would seem that he is speaking hypothetically or conjecturally, for he cannot distinctly specify any case of delivery, and accounts for his inability naturally enough by observing that, as he is merely a broker, it is no business of his to watch deliveries. I would notice also his first answer in cross-examination:—"The panch rate was for outstanding contracts, i.e., those not already settled: that is the usual custom for outstanding contracts."

On the other hand, the evidence called by the defendant to discharge the burden of proving that these were gaming transactions appears to me entitled to respect and belief. Vasantpal Javerchand, the *munim* of the important firm of Gadmal Gumanmal, is in an exceptionally good position to know what

(1) [1899] 1 Q. B. 794.

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such contracts really mean, and his interest is clearly to represent them as honest mercantile transactions. But he says in the most emphatic language that delivery never was either made or expected. He corroborates the defendant's *munims* that after Jagannath's absconding no one came on behalf of plaintiff to make any claim before the defendant's representatives. It is true that he contradicts the *munims* as to whether Jagannath left any books behind in the shop; but upon this point I feel sure that the *munims* are right, and that Vasantpal, who has no special reason to remember the precise time when the books were recovered, is committing an error of recollection. As to the nature of the contracts, Vasantpal is directly supported by Ram Karan Magniram and Rajbax Ramlal, both *munims* of Marvari firms to whom neither ignorance nor partiality can be attributed. This evidence leaves no room for reasonable doubt as to what is the real character of transactions such as these in suit: whether for that reason or another its admissibility is challenged by Mr. Davar on the ground that the witnesses speak only to *res inter alios actæ*. I have overruled the objection principally because I am of opinion that in this class of suits it would be almost idle to expect to get at the truth unless the Court takes the widest possible outlook consistent with the provisions of the Indian Evidence Act; otherwise the result would be that the statute could be violated with impunity by the simple and habitual device of cloaking wagers in the guise of contracts. In admitting this evidence as to the real character of precisely similar agreements made under the same conditions of time and place and circumstance I do not think that I am unduly straining the provisions of the Evidence Act, *e.g.*, section 7, and I may call in aid a passage from the judgment of Jenkins, C.J., in *Doshi Talakshi's* case⁽¹⁾; there the learned Chief Justice, in speaking of the "surrounding circumstances" of the agreements in that case says that these circumstances "and the position of the parties and the history of dealings of this class are legitimate, though not exclusive, matters for our investigation into the true intention of the parties." The words which I have italicised fortify my opinion that Mr. Davar's objection ought not to prevail.

(1) (1899) 24 Bom. 227 at p. 231.

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The remaining witnesses scarcely demand separate notice. Bachulal Navalchand is not a witness in whom I can place confidence, and I therefore omit his deposition from consideration. Surajmal Nihalchand also is not an impressive witness, and I suspect that the main object which he kept before his mind in the witness box was the expediency of saying nothing which could ever damage his legal position in regard to his own contracts. The *munims*, Chunilal and Raoji (or Nayakji), are of course interested parties, but it is due to them to say that, excluding the former's pretence of illness already referred to, I can discover no reason why they should be distrusted. Throughout a long and somewhat severe cross-examination their answers were always given readily and candidly, and though it may be that they know more of their master's linseed contracts than they profess, yet I think they are entitled to the description of substantially truthful witnesses.

Upon the whole, then, after the best consideration that I can give to all the evidence, I hold it to be distinctly proved that in the contracts in suit neither party ever intended to give or receive delivery, but both parties intended to settle by the payment and receipt of differences. In other words, the contracts were mere wagering transactions, and this suit must fail. With regard to costs, I am sitting as a judge to administer the law and I cannot enter into nice questions concerning the comparative moral culpability of the parties. I see no reason why the usual rule should not be followed. The defendant has succeeded on the first issue. The defendant will bear one-fifth of plaintiff's costs, and plaintiff will pay four-fifth of the defendant's costs and all his own costs.

It remains only to add that, if I had found in plaintiff's favour on the fifth issue, I should have awarded him the damages claimed since these are less than the sum which would be recoverable on the difference between the agreed price and the market rate prevailing on the due date.

Attorneys for the plaintiff—*Messrs. Mulla and Mulla.*

Attorneys for the defendant—*Messrs. Payne & Co.*

R. R.

APPELLATE CIVIL,

Before Mr. Justice Russell and Mr. Justice Batty.

1905,

July 25.

TRIMBAKRAO ANANDRAO MANTRI (ORIGINAL OPPONENT), APPELLANT,
 v. BALVANTRAO NARAYANRAO MANTRI (ORIGINAL APPLICANT),
 RESPONDENT.*

Pensions' Act (XXIII of 1871), section 4† — "Suit" — Execution proceedings — Payment of annuity charged on Saranjám lands — Liability of the son of the grantor to make the payment — Partition of family property — Income of a Saranjám village — Conciliation agreement — Dekkhan Agriculturists' Relief Act (XVII of 1879), section 4‡ — Decree.

A conciliation agreement was filed in Court on the 16th June 1882 under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). It effected partition of family property between two brothers, A and N. Under the agreement A undertook to pay to N Rs. 456-0-6 every year, and for the convenience of the parties this was to come out of the Saranjám lands which had

* Appeal No. 73 of 1904.

† Section 4 of the Pensions' Act runs as follows :—

"Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted."

‡ Dekkhan Agriculturists' Relief Act (XVII of 1879) sections 43 and 44 run as follows :—

43. If on the day on which the case is first heard by the Conciliator, or on any subsequent day to which he may adjourn the hearing, the parties come to any agreement, either finally disposing of the matter or for referring it to arbitration, such agreement shall be forthwith reduced to writing, and shall be read and explained to the parties, and shall be signed or otherwise authenticated by the Conciliator and the parties respectively.

44. When the agreement is one finally disposing of the matter, the Conciliator shall forward the same in original to the Court of the Subordinate Judge of lowest grade having jurisdiction in the place where the agriculturist who is a party thereto resides ;

and shall at the same time deliver to each of the parties a written notice to show cause before such Judge, within one month from the date of such delivery, why such agreement ought not to be filed in such Court.

The Court which receives the agreement shall, after the expiry of the said period of one month, unless cause has been shown as aforesaid, order such agreement to be filed ; and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed and from which no appeal lies.

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fallen to the share of A. The payment was regularly made during the life-time of A, and after his death, T, the son of A, continued to make the payment till 1899, when he stopped making any more payment. B, the son of N who had died, then filed a *darkhast* to enforce the payment of 1899-1900. T objected to this *darkhast* on two grounds: (1) that a certificate under the Pensions' Act (XXIII of 1871) was necessary; and (2) that A's interest having terminated with his death, the Saranjám must be considered as a fresh grant to the son who was not liable to continue the payment.

Held, (1) that a certificate under the Pensions' Act (XXIII of 1871) was not necessary, for the word "suit" in section 4 of the Act does not include execution proceedings.

Vajiram v. Ranchordji⁽¹⁾ followed.

Held, (2) that A was a trustee in respect of the Rs. 456-0-6 for Narayan, the obligation to pay which would attach to the succeeding holders of the Saranjám and it followed that N and his descendants would have the right to call upon A and his descendants to account for their management of the Saranjám and pay to them Rs. 456-0-6 per annum.

A consent decree can only be set aside upon the same grounds as an agreement can be set aside, *e.g.*, fraud or mistake or misrepresentation.

Per *BATTY, J.*—"A Court executing a decree cannot question the jurisdiction of the Court which passed it."

"The present application in no way affects property falling within the purview of the Pensions' Act, but seeks enforcement against the general assets of the judgment-debtor whose liability under the decree is not made a charge on the Saranjám or cash allowance at all. That liability appears to have been imposed and accepted not as effecting any partition of the Saranjám property, but for the purpose of effecting equality in the partition of non-Saranjám property, the Saranjám property being merely indicated as a fund available to the defendant for the purpose of discharging that liability."

APPEAL from an order passed by Vaman M. Bodas, First Class Subordinate Judge at Sátára.

One Raghunathrao died in 1873, leaving behind him two sons Anandrao and Narayanrao. The family estate consisted of the Saranjám village of Islámpur and other property. The two brothers were living jointly. Soon after, quarrels sprang up between Anandrao and Narayanrao, which led up to the conciliation agreement between them, which was filed in Court on the 16th June 1882, under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The agreement effected partition of the family property. One of the items to be partitioned was the

(1) (1892) 16 Bom. 731.

income of the Saranjám village of Islámpur. The arrangement as to it was that Anandrao was to pay Rs. 456-0-6 every year to Narayanrao, and this sum was mentioned to come "out of the cash collections, at the village of Islámpur."

Anandrao used to make the agreed payment to Narayanrao till his (Anandrao's) death in 1886, after that, his son, Trimbakrao continued to make the payment till 1899; after 1899, however, Trimbakrao refused to make any payment.

Narayanrao having died, his son Balvantrao filed a *darkhast* (No. 509 of 1901) to execute the conciliation agreement, which, under section 44 of the Dekkhan Agriculturists' Relief Act, 1879, had the force of a Civil Court's decree, and to recover Rs. 456-0-6 for 1899-1900.

Trimbakrao then applied to the Collector to recommend Government to resume and re-grant the Saranjám to him. This the Collector declined to do, and passed the following order :—

"On inquiry I find that on the death of Anandrao the name of his son was entered in the Government records in 1886 as Saranjámdar by the Mámlatdár as a matter of form, but no orders of Government were taken and the Saranjám was not formally resumed and re-granted free of incumbrances.

"It would apparently be possible for Government to now resume it and re-grant it free of incumbrances, but I am not inclined to recommend them to do so for the purpose of assisting Trimbakrao to evade the payment of an allowance which he continued to pay without objection for 14 years, *i.e.*, after his succession."

The Subordinate Judge in whose Court the application for execution was filed, directed the execution to "proceed for the recovery of the sum claimed."

Trimbakrao appealed to the High Court.

Vasudeo J. Kirtikar (with *Chitnis and Motilal and Nilkantha Atmaram*), for the appellant :—

The decree was passed between the appellant's father Anandrao and the respondent's father Narayanrao. The appellant was not a party to it. Therefore, the provision in the decree about the payment of Rs. 456-0-6 out of the cash revenue from Islámpur, which is Saranjám, is not binding upon the appellant. It was binding only during Anandrao's life-time, as he had only a life interest in the Saranjám.

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By the payment of Rs. 456-0-6 till 1899 the defendant is not estopped from contending that the provision in the decree cannot be executed against him. He is entitled to hold the Saranjám free from any incumbrance created by his father. The Judge has misunderstood the scope and object of the Collector's order (Exhibit 19). It cannot be said that Government declined to permit the appellant to enjoy the Saranjám as on a fresh grant, free from encumbrances. The order was not passed by Government. The tenure of the property was not altered thereby.

As the present application is in respect of Saranjám property, a certificate under the Pensions' Act is necessary.

Branson (with him *M. B. Chaubal* and *C. A. Rele*), for the respondent :—

The appellant paid the amount to the respondent's father and after his death to the respondent, from 1885 till 1899. He did not take any steps to have the provision in the decree set aside or modified. Validity of a decree of which execution is sought cannot be disputed in execution proceedings. See *Chintaman v. Chintaman*.⁽¹⁾

Since the passing of the Collector's order (Exhibit 19), no application was made by the appellant to alter the status. If the order was wrong, he ought to have applied to Government. There was no resumption and fresh grant free from incumbrances to the appellant. The Collector declined to permit him to enjoy the Saranjám as on a fresh grant, and he is to enjoy it by right of succession in the same way as other property of Anandrao's.

Under the decree Narayanrao got less than Trimbakrao got out of non-Saranjám income. So Rs. 456-0-6 were agreed to be paid to Narayanrao out of the cash revenue of Islámpur, as the appellant has taken the benefit of the partition decree, he must take the burden also.

The sum is not made a charge on the Saranjám. The provision in the decree merely indicates the source from which the sum is to be paid. The respondent does not seek to recover the amount from the income of Saranjám, but by attachment and sale of appellant's moveable property. Hence, a certificate under the

Pensions' Act is not necessary. Besides, a certificate is necessary only when a claim is to be established by a suit. See sections 4 and 6 of the Pensions' Act, 1871.

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Vasudeo J. Kirtikar, in reply :—The Court executing a decree can go into the question whether the Court has jurisdiction to pass it. See *Bhagwantappa v. Vishwanath*.⁽¹⁾

RUSSELL, J.—The decree sought to be executed herein is a conciliation agreement filed in Court on 16th June 1882 under section 44 of the Dekkhan Agriculturists' Relief Act, 1879. It effected partition of family property between two brothers, Narayan and Anandrao Mantri of Islampur, who were joint. The present appellant is Trimbak, son of Anandrao, and the respondent is Balwant, son of Narayan. [His Lordship read the material parts of the agreement.] One of the items to be partitioned was the income of the Saranjam village of Islampur. Out of that Anandrao was to pay every year Rs. 456-0-6 to Narayan. They are both dead. It is admitted that till 1899 the payment was duly made during their lives and even afterwards by Trimbak to Narayan. The present Darkhast is by Balwant to enforce payment for 1899-1900.

The first objection is that a certificate under the Pensions' Act is necessary.

As to this we are of opinion that the Pensions Act XXIII of 1871 does not apply; for the word "suit" in section 4 does not include execution proceedings, see *Vajiram v. Ranchordji*⁽²⁾ where Jardine, J., says (page 735): "We are of opinion that, if the Legislature had intended this consequence, it would have amplified the words of section 11 so as to include such property mentioned in section 4 as is not specified in section 11. The Act is to be construed strictly—*Ravji v. Dadaji*⁽³⁾—and its operation is not to be extended further than the language requires."

The next objection is that Anandrao's interest having terminated with his death, the Saranjam must be considered as a fresh grant to his son, and that the latter is not bound by the decree and liable to continue the yearly payment.

(1) (1904) 23 Bom. 378; 6 Bom. L. R. 342.

(2) (1892) 16 Bom. 731, p. 735.

(3) (1875) 1 Bom. 523.

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It appears from the above agreement that the income from Saranjam lands came to about Rs. 9,367 and from non-Saranjam sources to about Rs. 7,590. Narayan was to get Rs. 3,029 out of the latter. It was purely for the convenience of the brothers that Rs. 456-0-6 were to come out of the Saranjam lands of Islampur. Narayan, in his application for execution, asks that if the defendant does not pay Rs. 456-0-6, &c., the same may be realized by attachment and sale of the defendant's moveable property at Islampur and paid to him.

By Exhibit 19, the order of the Collector of Sátára, dated 3rd October 1903 (which his Lordship read), the Collector declined to recommend Government to resume and re-grant their Saranjam for the purpose of assisting Trimbakrao to evade the payment of an allowance which he continued to pay without objection for 14 years, *i.e.*, after his succession. We refer to this because—as appears below—the Civil Courts, in dealing with Saranjams, must have regard to the rules laid down by Government.

It is necessary to consider the position of Anandrao, defendant's father, towards his brother Narayan.

In *Ramchandra v. Venkatrao*⁽¹⁾, it is laid down "that it is for the Government to determine how *Saranjams* are to be held and inherited, and that, if the Civil Courts had jurisdiction over claims relating to *Saranjams*, they would be bound to determine such claims according to the rules laid down by the Government." Now the orders of Government are that the Saranjam shall not be sub-divided, but that the obligation of the holder to maintain the younger members of his family shall be strictly enforced, Nairne's Revenue Hand-book (Edn. of 1872), page 346, paragraphs 13, 14. See *Moreswar v. Kushaba*⁽²⁾. In *Narayan v. Vasudeo*⁽³⁾ it was held that the defendant's possession, being admittedly one for management subject to the rights of the shares to receive their respective shares in the profits of the village, was the possession of a trustee of such profits. The plaintiff was, therefore, entitled to have an account taken of the management of the village by the defendant, and there was no limit to the period over which

(1) (1882) 6 Bom. 598 at p. 610.

(2) (1877) 2 Bom. 248 at p. 251.

(3) (1890) 15 Bom. 248.

the accounts should extend other than the limits stated in the plaint.

Again Saranjams are only *prima facie* impartible, the holders being required to make a suitable provision for their younger brothers, *Madhavrao v. Atmaram*⁽¹⁾. In the present case Anandrao was a trustee in respect of the Rs. 456-0-6 for Narayan, the obligation to pay which would attach to the succeeding holders of the Saranjam and it follows that Narayan and his descendants would have the right to call upon Anandrao and his descendants to account for their management of the Saranjam and pay to them the Rs. 456-0-6 per annum. The case, it seems, is analogous to *Pirthi Pal v. Thakur Jewahir*⁽²⁾, where it was held that where a judgment of the Judicial Committee in 1879 declared that the defendant to a suit brought in 1865 held the villages in suit in trust for the joint family to which he belonged, and as a joint family governed by the Mitakshara, and decreed that the defendant do cause the said villages and the proceeds thereof to be managed, dealt with and applied accordingly: the Courts below were precluded from holding in subsequent suits that such defendant held the said villages as an integral impartible estate according to the rule of primogeniture without the said trust, or from declaring that the plaintiff was entitled to have his share allotted on partition, to be held by him as sub-proprietor to the defendant.

In the present case the Rs. 456-0-6 per annum was not allotted to Narayan on the partition, but Anandrao simply (for valuable consideration) declares himself and his successor after him a trustee of that sum for Narayan and his successors. Instead of paying Narayan a sum down, Anandrao agrees to pay him so much a year out of the income of the Saranjam. There seems to be no reason why this Court should not give effect to such an arrangement, and we cannot find anything in the nature of Saranjams to prevent it.

Another ground upon which the plaintiff is entitled to succeed is that the decree which is referred to was one *by consent*. So long as that decree stands, it is incumbent upon the Court to execute it. It constituted an agreement between Anandrao and

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(1) (1890) 15 Bom. 519.

(2) (1886) 14 I. A. 37.

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his brother Narayan and can only be set aside upon the same grounds as an agreement can be set aside, *e. g.*, fraud or mistake or misrepresentation. See per Lord Esher, M. R., in *The Bellcairn*⁽¹⁾ and *In re South American and Mexican Company*⁽²⁾.

For the above reasons we confirm the decretal order of the lower Court with costs.

BATTY, J.:— I would add that under the rulings in *Chogalal v. Trueman*⁽³⁾, *Kasturshet v. Rima*⁽⁴⁾, *Chintaman v. Chintaman*⁽⁵⁾, and cases there cited, a Court executing a decree cannot question the jurisdiction of the Court which passed it. The case of *Bhagwantappa v. Vishwanath*⁽⁶⁾, cited by the appellant's pleader, follows that of *Chogalal v. Trueman*⁽³⁾, and only shows that a Court to which a decree is sent, can, before it becomes the Court executing the decree, consider the jurisdiction of the Court which passed it, so that, if not satisfied on the point, it may decline to become the Court executing the decree, in which case the parties must go back to the Court which passed the decree. That case has no application here. Moreover, the present application in no way affects property falling within the purview of the Pensions' Act, but seeks enforcement against the general assets of the judgment-debtor whose liability under the decree is not made a charge on the Saranjam or cash allowance at all. That liability appears to have been imposed and accepted not as effecting any partition of the Saranjam property, but for the purpose of effecting equality in the partition of non-Saranjam property, the Saranjam property being merely indicated as a fund available to the defendant for the purpose of discharging that liability. The appellant has failed to show that the execution sought can be resisted on the grounds above considered or on any other ground. I concur in dismissing the appeal with costs.

R. R.

Appeal dismissed.

(1) (1885) 10 P. D. 161 at p. 165.

(4) (1885) 10 Bom. 65.

(2) [1895] 1 Ch. 37.

(5) (1896) 22 Bom. 475.

(3) (1883) 7 Bom. 481.

(6) (1904) 28 Bom. 373; 6 Bom. L. R. 342.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

RAMAYA BIN SUBAYA AND ANOTHER (ORIGINAL DEFENDANTS 4 AND 5),
APPELLANTS, v. DEVAPPA GANPAYA (ORIGINAL PLAINTIFF), RES-
PONDENT.*

1905.

July 27.

*Evidence taken in a particular way—Consent of parties—Jurisdiction
of the Court.*

In a suit to recover damages for wrongful diversion by the defendants of the course of a brook, the Subordinate Judge, at the desire of both the parties, proceeded to the spot of the diversion, made inspection and examined witnesses on the spot. The depositions of the witnesses were taken down in vernacular by a clerk of the Court. On going through the evidence the Subordinate Judge dismissed the suit, holding that the defendants had not diverted the course of the brook and the plaintiff had not suffered any damage. The plaintiff appealed and raised a preliminary objection to the procedure of the Subordinate Judge. The Judge in appeal held that the Subordinate Judge's procedure vitiated the decision and reversed the decree and remanded the suit for trial on the merits.

On second appeal by the defendants against the order of remand,

Held, reversing the decree of the Judge and restoring the appeal to the file, that the parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way and it is a common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used.

APPEAL from an order of remand passed by C. C. Boyd, District Judge of Kanara, reversing the decree of G. N. Kelkar, Subordinate Judge of Sirsi, and remanding the suit for trial on the merits.

The plaintiff sued to recover Rs. 3,500 as damages for wrongful diversion by the defendants of the course of a brook which ran through the lands of the parties. The defendants denied that they had diverted the course of the brook and contended that the plaintiff had not suffered any damage. The Subordinate Judge, at the desire of both the parties, proceeded to the village where the lands were situate, made inspection and examined a number of witnesses whose depositions were taken

* Appeal from Order No. 6 of 1905.

1905.

RAMAYA
v.
DEVAPPA.

down in vernacular by his kárkún. With the said materials added to the proceedings in the Court the Subordinate Judge held that the defendants had not diverted the course of the brook and that the plaintiff had not suffered any damage. He, therefore, dismissed the suit.

The plaintiff appealed and at the hearing of the appeal urged a preliminary objection that the greater part of the evidence was not taken by the Subordinate Judge in his Court and so his decision based as it was on such illegally admitted evidence should be set aside. As to the procedure adopted by the Subordinate Judge the plaintiff raised three objections, namely that:—

(1) The Subordinate Judge omitted to draw up a memorandum of the results of his inspection, *Joy Coomar v. Bundhoo Lal*.⁽¹⁾

(2) He omitted to write an English memorandum of the substance of the depositions of the witnesses examined at the village, section 184 of the Civil Procedure Code (Act XIV of 1882) and High Court Circular Orders, page 14, section 32.

(3) He was not empowered to record depositions of witnesses at the village as that amounted to a trial of the case which could only be held at his Court, section 23 of the Civil Courts' Act (XIV of 1869).

The Judge found that the Subordinate Judge's procedure vitiated the decision. He, therefore, reversed the decree and remanded the suit for trial on the merits for the following reasons:—

The first objection would not hold good in view of the remarks of the learned Judge who tried the case cited. From these remarks it appears that a memorandum of inspection ought to be drawn up, but that, if it is not, that omission alone would not justify an Appellate Court in ignoring the account of the inspection given in the lower Court's judgment.

With regard to objection (2), I think the irregularity might be cured by section 578, Civil Procedure Code (*vide* 9 W. R. 69, Cr.).

Objection (3) must, I think, prevail. Practically this suit was heard at the village. Witnesses were summoned to appear there. Parties and pleaders were present. Witnesses were examined and cross-examined. Their examination, though not amounting to a complete trial of the suit, was a substantial part of

(1) (1882) 9 Cal. 363.

it. It is argued that the Code contemplates that part of a trial may be in a place other than the Court-house, *e. g.*, with regard to the examination of witnesses by a Commissioner. Let that be granted. But, unless otherwise specially provided by the Code, a suit must be tried in the Court-house. And there is no provision in the Code authorizing a Judge to record evidence anywhere else. It follows that it is illegal for him to do so. Under section 392 he may make a local inspection, and he should reduce to writing the results of that; but he is nowhere authorized to record evidence of witnesses anywhere except in the place or places specified by the Government.

Were it otherwise, there would be nothing to prevent a Judge from touring about as a Magistrate does, and holding Court in any remote place in his jurisdiction. And this is not the intention of Government. It is obvious that the consent or otherwise of the parties makes no difference; they cannot give him more or less power than the Crown has given.

It is argued for respondent that a Judge can authorize a Commissioner (section 393) to record evidence at places all over his jurisdiction and that he cannot have less power in him than the power which he can give to the Commissioner. It is true that the depositions so recorded by the Commissioner may, *ceteris paribus*, be admitted in evidence. But the fallacy in this argument is that a Commissioner may be afterwards called and examined and cross-examined as a witness, whereas a Judge cannot. Hence in this case the Sub-Judge exercised a greater power than that which he could have given to a Commissioner.

Against the order of remand defendants 4 and 5 appealed.

G. S. Mulgamkar appeared for the appellants (defendants 4 and 5):—The Judge was wrong in holding that the evidence taken by the Subordinate Judge at the spot was illegally admitted and that it vitiated the whole proceeding. We contend that section 23 of the Civil Courts' Act does not prevent a Judge from holding inquiry on the spot when such inquiry becomes necessary owing to the peculiar circumstances of a case. Even the Civil Procedure Code contemplates such inquiry, see section 392. The presiding Judge can proceed to the spot for local investigation, *Dwarka Nath Sardar v. Prosunno Kumar Hajra*⁽¹⁾. Besides in the present case both the parties had applied to the Court not only for local investigation by the Subordinate Judge in person but had also summoned witnesses at the spot. The parties had thus consented to the procedure adopted by the Subordinate Judge, and the plaintiff, moreover, did not object to the procedure even in his memorandum of appeal before the Judge.

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S. V. Palekar appeared for the respondent (plaintiff):—Section 23 of the Civil Courts' Act should be construed strictly, that is, the Judge cannot hold his court outside the Court-house. An illegality cannot be remedied by consent.

The order of remand was proper, because the Subordinate Judge decided the case on materials totally insufficient for the decision of the case on the merits.

JENKINS, C. J.—We are of opinion that the District Judge has erred, for it cannot be said that what has been done affects the jurisdiction of the Court. Parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way, and it is a common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used.

Therefore we are of opinion that the order of the District Court must be reversed.

It has been suggested before us that the materials are so defective that when the Court comes to deal with the case on the merits, it will be found necessary to send the case back. As to that we say nothing, and the order which we now pass will not interfere with any order of that kind which the Judge may find it necessary to make, should the circumstances demand it.

The appeal, therefore, will be restored to the file of the District Court, and that Court will proceed with the further hearing.

Appellants must get their costs.

Order reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

NARAYAN PARMANAND (ORIGINAL DEFENDANT 5), APPELLANT, v.
NAGINDAS BHAIIDAS (ORIGINAL PLAINTIFF), RESPONDENT.*

1905.

July 20.

*Suit of the nature cognizable in the Court of Small Causes—Execution
of decree—Second appeal.*

No second appeal lies against an order in execution of a decree in a suit of the nature cognizable in the Court of Small Causes.

Shyama Charan Mitter v. Debendra Nath Mukerjee(1), followed.

SECOND appeal from the decision of V. V. Phadke, First Class Subordinate Judge of Thána, with Appellate powers, confirming the decree of N. V. Atre, First Class Subordinate Judge, in an execution proceeding.

Kala Parmanand and Narayan Parmanand were two brothers. They were divided in interest and carried on separate dealings. Parmanand carried on trade in his own name and on his death the trade was managed by his widow Panbai, who died leaving a will under which she appointed four persons as executors. After Panbai's death her creditor Nagindas Bhaidas brought a suit, No. 1113 of 1899, in the Court of the First Class Subordinate Judge of Thána in his Small Cause Jurisdiction for the recovery of Rs. 155-3 on account of the value of goods supplied to her. The defendants in the said suit were the four executors appointed under the will of the deceased Panbai and Narayan Parmanandas, defendant 5, who was joined as being the heir of Panbai and younger brother of Panbai's husband Narayan Parmanand. The Subordinate Judge passed a decree for the recovery of Rs. 155-3 from the property of the deceased defendant Panbai. Subsequently the plaintiff having attached two houses in execution of the said decree under the ordinary jurisdiction of the First Class Subordinate Judge, Narayan Parmanandas, defendant 5, applied for the removal of the attachment on the ground that he and the husband of the deceased Panbai

* Second Appeal No. 719 of 1904.

(1) (1900) 27 Cal., 484.

1905.

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were united brothers, that the attached property belonged to him and as Panbai had no interest in it, it could not be sold in execution of the decree obtained against her for her personal debts. The Subordinate Judge found that the allegations made by the applicant, defendant 5, were not proved. He, therefore, rejected the application. On appeal by the applicant, defendant 5, the Judge confirmed the order.

The applicant, defendant 5, preferred a second appeal.

D. A. Khare appeared for the respondent (plaintiff):—We have to urge a preliminary objection. No second appeal lies. The suit was for the recovery of Rs. 155 and odd for the value of goods supplied. It was, therefore, cognizable by the Court of Small Causes; sections 586 and 647 of the Civil Procedure Code, *Shyama Charan Mitter v. Debendra Nath Mukerjee*⁽¹⁾. There is no reported decision on the point.

M. M. Karbhari appeared for the appellant (applicant, defendant 5):—The appellant being a party to the original suit, he could only proceed under section 244 of the Civil Procedure Code, *Bhimrao Ramrao v. Ayyappa*⁽²⁾. An order passed under that section is a decree. Therefore in order to determine whether a second appeal lies, the nature of the proceedings under that section must be taken into consideration and not the nature of the original suit. The order appealed against was passed by the First Class Subordinate Judge in his ordinary jurisdiction and it affected immoveable property, therefore, we submit a second appeal can lie.

If the second appeal cannot be allowed, we apply for permission to convert it into an application under the extraordinary jurisdiction, section 622 of the Civil Procedure Code.

JENKINS, C. J.:—This is an appeal arising out of an application in execution of a decree. That decree was passed in a suit of the nature cognizable in the Court of Small Causes, and it has been established by a number of reported decisions of which, so far as we are aware, *Shyama Charan Mitter v. Debendra Nath Mukerjee*⁽¹⁾ is the last, that no second appeal lies. Though there

(1) (1900) 27 Cal., 484.

(2) (1904) 6 Bom. L. R., 697.

is no reported case of this Court on the point, we think we ought to follow these decisions. We must accordingly give effect to the preliminary objection and dismiss this appeal with costs.

It has been suggested that we might deal with the appeal as an application under section 622, but that will carry the appellant no further, because that of which he complains is, if erroneous—a point on which we express no opinion—an error of law not falling within section 622 of the Civil Procedure Code.

Appeal dismissed.

G. B. R.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

KRISHNAJI BAPPAJI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,
v. KASHIBAI, WIDOW OF VISHNU MAHADEO (ORIGINAL DEFENDANT), RESPONDENT.*

1905.

August 1.

Civil Procedure Code (Act XIV of 1882), Chapter XIX, Division H—Decree for possession—Execution of decree—Obstruction—Application for removal of obstruction numbered and registered as suit—Adverse possession—Limitation.

On the 1st June 1889 defendant's husband Vishnu sold certain land to Vithal and passed to him a rent-note the period of which expired on the 20th March 1890. Subsequent to the expiry of the period, Vishnu, and after his death his widow, the defendant, continued in possession. Afterwards the plaintiffs, to whom the land had been sold, having obtained a decree for possession against the sons of Vithal, Vithal's widow, Kashibai, caused obstruction to delivery of possession in execution of the decree. The plaintiffs, thereupon, on the 22nd January 1902, applied for the removal of the obstruction and the Court, on the 26th July 1902, ordered that their application be numbered and registered as a suit between the decree-holders as plaintiffs and the claimant as defendant under section 331 of the Civil Procedure Code (Act XIV of 1882), Chapter XIX, Division H.

Held, reversing the decree of the lower Appellate Court, that the suit was not time-barred. The claimant was not entitled as against the decree-holders to count the time up to the 26th of July 1902, when the application was numbered as a suit, as the period of his adverse possession; for it had ended prior

* Second Appeal No. 509 of 1904.

1905.

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to the 20th March 1890, by reason of the proceedings under Division H of Chapter XIX of the Code of Civil Procedure, initiated on the 22nd of January 1902.

SECOND appeal from the decision of Vaman M. Bodas, First Class Subordinate Judge of Sátára with appellate powers, reversing the decree of H. A. Mohile, Second Class Subordinate Judge of Khatáv.

One Vishnu Mahadev Gosavi, the husband of the defendant, sold certain land to Vithal Krishna Fadnis on the 1st June 1889 and continued in possession of it under a rent-note the period of which expired on the 20th March 1890. Subsequent to the expiry of the rent-note the vendor Vishnu, and after his death his widow, the defendant, remained in possession. In the meanwhile the land having been sold to the plaintiffs, they brought a suit, No. 38 of 1899, against Narhar, Vithal and others, the sons of Vishnu Mahadeo, deceased, for recovery of possession and obtained a decree. While the decree was being executed, Kashibai, the widow of Vishnu Mahadeo, caused obstruction to the delivery of possession on the 23rd December 1901. The plaintiffs, thereupon, applied on the 22nd January 1902 for the removal of her obstruction, and the Court, on the 26th July 1902, ordered that their application be numbered and registered as a suit under section 331 of the Civil Procedure Code (Act XIV of 1882). The first Court after inquiry passed a decree awarding possession to the plaintiffs.

On appeal by the defendant the Judge reversed the decree and dismissed the suit on the ground that as it was brought on the 26th July 1902, that is, more than twelve years after the expiry of the rent-note on the 20th March 1890, it was time-barred.

The plaintiffs having preferred a second appeal, it was at first rejected, but subsequently the plaintiffs having applied for review, it was admitted.

S. R. Bakhle appeared for the appellants (plaintiffs):—We filed our application to remove the obstruction caused by the defendant under section 328 of the Civil Procedure Code on the 22nd January 1902. On that day the defendant's adverse

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possession for twelve years had not been completed and ripened into a title. The Court ordered the application to be numbered and registered as a suit on the 26th July 1902. The period between January and July was taken up by the Court and we are not responsible for it. Our suit should be taken as instituted on the day the application was made as no fresh presentation of the plaint has to be made under section 331 of the Civil Procedure Code, but the application itself is registered as a suit. At any rate from the date of the presentation of the application the character of the defendant's possession ceased to be adverse to us.

M. B. Chaubal appeared for the respondent (defendant):— Under section 4 of the Limitation Act, a suit is said to be instituted when the plaint is presented to the proper officer. The period occupied in disposing of the application cannot be taken into consideration, for under section 3 of the Act a suit does not include an application. The plaintiffs could have filed a regular suit within the period of limitation. They had that remedy open, and if they failed to resort to it and waited till the decision on the application they must take the risk.

Under section 331 of the Civil Procedure Code, "the claim" is to be numbered as a suit and that expression is used for the claim the defendant or the obstructor makes. In the present case that claim is not treated as a suit, but the plaintiffs' application is so treated. Our possession, therefore, continued to be adverse till the 26th July 1902, when the application was ordered to be numbered and registered as a suit, and had ripened into a title by that time. We are, therefore, entitled to resist plaintiffs' suit under article 144 of the Limitation Act, counting the time down to the institution of the suit.

Bakhle, in reply.

JENKINS, C. J.:—This is an appeal arising out of proceedings in execution of a decree.

It has been held by the lower Appellate Court reversing the decision of the first Court that the decree-holders are barred as against the respondent before us.

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The plaintiffs obtained a decree for possession of land and in the execution of that decree the officer charged with the execution of the warrant was resisted or obstructed by the respondent.

This led to proceedings under division (H) of Chapter XIX of the Civil Procedure Code, and the claim was numbered and registered as a suit between the decree-holders as plaintiffs and the claimant as defendant in pursuance of an order passed on the 26th of July 1902. At that date the claimant had been in adverse possession of the property for more than 12 years, and if the rights of the parties had to be determined by reference to that date, then under section 28 of the Limitation Act, the interest of the decree-holders would be extinguished.

But in our opinion that is not the crucial date. The twelve years of adverse possession expired in March 1902 and prior to that the proceedings had been taken under division (H) of Chapter XIX of the Code of Civil Procedure.

It seems to us, therefore, impossible to say that the claimant is entitled as against the decree-holders to count the time up to the 26th of July 1902 as the period of his adverse possession; for it had ended prior to the 20th of March 1890, and so within the period of limitation.

We accordingly reverse the decree of the District Court and send back the case that it may be restored to the file and heard in the ordinary course.

The appellants must bear the respondent's costs of the review, but the rest of the costs in this Court will follow the result.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

DATTOO VALAD TOTARAM (ORIGINAL PLAINTIFF), APPELLANT, v. RAM-
CHANDRA TOTARAM AND ANOTHER (ORIGINAL DEFENDANTS), RE-
SPONDENTS.*

1905,
August 2.

Indian Evidence Act (I of 1872), section 92—Written document—Absolute conveyance—Mortgage—Contemporaneous oral agreement or statement of intention—Inference from circumstances.

The plaintiff sued to recover possession of land contending that the document under which the defendants held the land, though in form an absolute conveyance, was intended to operate merely as a mortgage. The plaintiff's contention was based on the grounds that the consideration was a previously existing debt and not money paid at the time; that the plaintiff's father, notwithstanding the execution of the deed, remained in possession until his death and that after his death his widow remained in possession for three years; that there was no transfer of the land into the *khata* of the transferee and that the consideration was grossly inadequate.

The first Court held the transaction to be an out-and-out sale and dismissed the suit.

On appeal by the plaintiff,

Held, confirming the decree, that the meaning of the contention of the plaintiff was that the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred from the said several circumstances relied on, but that in questions of this kind Courts in India must be guided by section 92 of the Evidence Act (I of 1872), and cannot have recourse to those equitable principles which enable the Court of Chancery to give relief in those cases of which *Alderson v. White*⁽¹⁾ or *Lincoln v. Wright*⁽²⁾ furnish examples. This, however, would not have precluded the plaintiff from relying on the provisos to the section, had any of them been applicable.

APPEAL from the decision of R. G. Bhadbhade, First Class Subordinate Judge of Dhulia, in original suit No. 723 of 1903.

The plaintiff sued to recover possession of certain lands together with three years' *mesne* profits, alleging that his father Totaram passed a conveyance to defendants' father on the 4th July 1878 for the said lands, the consideration being stated to be Rs. 400, that the real transaction was a mortgage, but the

* Appeal No. 123 of 1904.

(1) (1858) 2 De G. and J. 98.

(2) (1859) 4 De G. and J. 16.

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defendants' father having represented to the plaintiff's father, who was indebted to other creditors, that a mortgage would clash against a new legislation which was then expected, the latter was induced to consent to pass the said conveyance but was not paid the consideration; that the lands were at the time of the said transaction worth about Rs. 6,000; that the plaintiff's father remained in possession of the lands until his death in 1881; that the plaintiff was then a minor and went to live elsewhere, and that the defendants, thereupon, took wrongful possession of the lands. The plaintiff further alleged that even if the payment of the consideration, namely, Rs. 400, to his father be proved, the mortgage was satisfied by the profits of the land.

The defendants answered *inter alia* that their deceased father purchased the lands *bond fide* for the consideration of Rs. 400 paid in cash; that there was no fraud or misrepresentation on his part, nor was the transaction one in the nature of a mortgage; that the consideration was then adequate; that the lands were at the time of the suit worth about Rs. 3,000; and that the suit was time-barred.

The Subordinate Judge found that the transaction in suit was not a mortgage; that the previous debts of Rs. 400 due by the plaintiff's father were wiped off on account of the consideration and that the suit was time-barred. He, therefore, dismissed the suit.

The plaintiff appealed.

Robertson (with *V. V. Ranade*) for the appellant (plaintiff):—

There are various circumstances in the case which go to show that the transaction, though called a sale, was really not so. It was in fact a mortgage because no consideration actually passed, there was no transfer of the *khata* to the name of the vendee, the consideration was totally inadequate, and what is most important is that the property remained in the possession of the vendor.

[JENKINS, C. J.—But how do you get over the effect of the Privy Council ruling in *Balkishen Das v. W. F. Legge*⁽¹⁾.]

(1) (1899) 22 All. 149.

We submit that in a case like the present external circumstances can be taken into consideration to determine the real nature of the transaction. Even the proviso to section 92 of the Evidence Act supports our view.

Bahadurji (with *M. B. Chaulal*) for the respondents (defendants) was not called upon.

JENKINS, C. J.—The plaintiff sues to recover possession of land, alleging that the document passed by his father, though in form an absolute conveyance, was intended to operate merely as a mortgage.

The grounds on which that contention was based are that the consideration was a debt and not money paid at the time; that the plaintiff's father, notwithstanding the execution of the deed, remained in possession until his death, and that after his death his widow remained in possession for three years; that there was no transfer of the land into the *khata* of the transferee; and that the consideration was inadequate.

The lower Court has decided against the claim of the plaintiff, holding that the transaction was what it purported to be an out-and-out sale. It accordingly dismissed the suit with costs.

From that decree the present appeal is preferred.

If we look to the deed alone, it is clear that the decree is correct, and that the plaintiff's father parted with his interest in the property. But it is said that the circumstances to which we have alluded require that we should draw an inference that the document is not what it appears to be.

We can only understand that as meaning that the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred from these several circumstances.

But it has been pointed out by the Privy Council in *Balkishen Das v. W. F. Legge*⁽¹⁾ that in questions of this kind the Courts in India must be guided by section 92 of the Evidence Act; and that we cannot have recourse to those equitable principles which enable the Court of Chancery to give relief in those cases of which *Alderson v. White*⁽²⁾, or *Lincoln v. Wright*⁽³⁾ furnish us

(1) (1899) 22 All. 140; 2 Bom. L. R. 523.

(2) (1858) 2 D. G. and J. 98.

(3) (1859) 4 D. G. and J. 16.

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with examples. We think that the contention urged by the appellant is opposed to the ruling of the Privy Council.

This does not preclude a litigant from relying on the provisos to the section; but there is no case made here which would enable us to say that any of them are applicable to the circumstances of this case.

We must, therefore, confirm the decree with costs.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

1905.
 August 4.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.
 BAI HANSA (ORIGINAL DEFENDANT), APPELLANT, v. ABDULLA
 MUSTAFFA (ORIGINAL PLAINTIFF), RESPONDENT.*

Mahomedan Law—Suit for restitution of conjugal rights—Non-payment of dower—Consummation of marriage.

To a husband's suit for restitution of conjugal rights, the wife pleaded non-payment of dower. To this the husband pleaded consummation of marriage.

Held, that after consummation of marriage, non-payment of dower, even though proved, cannot be pleaded in defence of an action for restitution of conjugal rights.

Abdul Kadir v. Salima⁽¹⁾, *Kunki v. Moidin*⁽²⁾, and *Hamidunnessa Bibi v. Zohiruddin Sheikh*⁽³⁾, followed.

SECOND appeal from the decision of J. C. Gloster, District Judge of Broach, confirming the decree of S. B. Upasani, Subordinate Judge of Ankleshvar.

The plaintiff sued the first defendant for restitution of conjugal rights alleging that she was married to him about twelve years before suit and had since then been living with him and had issue by him, that about three years before suit she went to her father's house on business and was not allowed to return to him, that he gave a written notice on the 25th December 1900 to her father asking that she might be sent back and that notice

* Second appeal No. 124 of 1905.

(1) (1886) 8 All. 149.

(2) (1888) 11 Mad. 327.

(3) (1890) 17 Cal. 670.

not being complied with the plaintiff had brought the present suit. He prayed that defendant 1 might be ordered to return to him and live with him as his wife.

Defendant 1 answered that she had been living away from the plaintiff for nine or ten years, that before that she lived with him but he ill-treated her and drove her out from his house and she had to go to stay with her father, defendant 2, that on the intercession of common friends she again went to live with the plaintiff, but about ten years before suit he again assaulted her and pursued her to her father's house and that finding it not safe to live with the plaintiff, she had since then continued to live with her father. She further stated that she was married to the plaintiff about seventeen years before suit, and at the time of the marriage her *meher* (dower) was settled at Rs. 127-8-0, but the said *meher* was not paid to her in spite of her repeated demands for the same and that until it was paid to her the plaintiff's suit for restitution of conjugal rights should not be entertained.

Defendant 2, the father of defendant 1, was joined as a defendant on the ground that he had prevented the first defendant from returning to the plaintiff; but as the said defendant died during the pendency of the suit and as no steps were taken to continue the suit as against his heirs, the suit abated so far as he was concerned.

The Subordinate Judge found that it was not proved that the defendant was ill-treated or driven from his house by the plaintiff, that no misconduct or ill-treatment sufficient to justify the defendant's refusal to stay with the plaintiff was proved, that the non-payment of the *meher* did not justify the defendant's refusal to stay with the plaintiff and that the defendant might be ordered to go and live with the plaintiff as his wife. He, therefore, passed a decree allowing the plaintiff's claim.

On appeal by the defendant, the Judge without considering the question relating to the payment of the *meher* as a condition precedent to the maintenance of the suit, confirmed the decree on the following ground:—

On the whole I do not consider that the evidence shows that the wife has any good reason "to entertain well-founded apprehensions for her personal safety"—vide *Jogendronundini v. Hurry Doss*⁽¹⁾—at the same time it is clear

(1) (1879) 5 Cal. 500 at p. 507.

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that the husband's conduct has been far from exemplary, and though a decree is passed in his favour its lasting effect must depend on his treating appellant properly in the future.

The defendant preferred a second appeal.

Markand N. Mehta appeared for the appellant (defendant):—The first Court having raised an issue with respect to the *meher*, it ought to have recorded a finding as to whether it was paid or not. Our contention is that the non-payment of the *meher* is a good answer to a suit for restitution of conjugal rights, and if the suit cannot be dismissed on that ground, then the payment of the *meher* should be made a condition precedent to the execution of the decree. The rulings in *Eidan v. Mazhar Husain*⁽¹⁾ and *Wilayat Husain v. Allah Rakhi*⁽²⁾ are in our favour, but the subsequent ruling in *Abdul Kadir v. Salima*⁽³⁾ made a distinction between a suit for restitution of conjugal rights brought before consummation and one brought after consummation. It was held there that non-payment of the *meher* may be a good ground for resisting a suit brought before consummation, but it is not a good ground for defending a suit brought after consummation. We contend that such distinction is not warranted in Mahomedan Law, see Ameer Ali's Mahomedan Law (2nd Edn.), Vol. II, p. 399; Wilson's Digest of Anglo-Mahomedan Law (2nd Edn.), p. 151. Though the ruling in *Abdul Kadir v. Salima*⁽³⁾ is followed in *Kanki v. Moidin*⁽⁴⁾ and *Hamidunnessa Bibi v. Zohiruddin*⁽⁵⁾ there is no decision of this High Court following that view. The texts of the Mahomedan Law as expounded by Ameer Ali and Wilson should be followed. Further we rely on the decision in *Abdul v. Hussenbi*⁽⁶⁾ in which a conditional decree was passed.

[JENKINS, C. J.:—In that case the question of consummation was not gone into and there was no finding as to consummation.]

It seems from the summary of the written statement in that suit that there had been consummation but there was no distinct issue or finding on the point.

Next we contend that having regard to the past ill-treatment of the plaintiff and his moral conduct some terms should be

(1) (1877) 1 All. 483.

(2) (1880) 2 All. 831.

(3) (1886) 8 All. 149.

(4) (1888) 11 Mad. 327.

(5) (1890) 17 Cal. 670.

(6) (1904) 6 Bom. L. R. 728.

imposed on him for safe-guarding the interests of the wife,
Surjyamoní Dasi v. Kali Kanta Das.⁽¹⁾

L. A. Shah, who appeared for the respondent (plaintiff), was not called upon.

JENKINS, C. J. :—To a husband's suit for restitution of conjugal rights, the wife has pleaded non-payment of dower. To this the husband has pleaded consummation of the marriage.

The question is whether under these circumstances the husband is entitled to a decree absolutely or only conditional upon his paying dower.

It has been decided by a Full Bench of the Allahabad High Court in *Abdul Kadir v. Salima*⁽²⁾ that after consummation of marriage, non-payment of dower, even though proved, cannot be pleaded in defence of an action for restitution of conjugal rights.

That has been followed by the Madras High Court in *Kunhi v. Moidin*⁽³⁾ and by the Calcutta High Court in *Hamidunnessa Bibi v. Zohiruddin*⁽⁴⁾.

There is no authority on the point in this Court. Although Mr. Mehta suggests that *Abdul v. Hussenbi*⁽⁵⁾ supports his contention, it is clear that it does not, because in that case there was no finding that the marriage had been consummated, nor was it suggested in argument that the cases to which we have referred had any application.

Under these circumstances we are of opinion that, notwithstanding the forcible criticisms that have been urged against the cases that we have cited, we ought still for the sake of conformity to follow them, and adopt the legal proposition established by them.

It is suggested that having regard to the husband's conduct in the past and the wife's apprehensions, we might introduce some condition in the decree, but the materials for that purpose are insufficient.

The result, therefore, is that we must confirm the decree without any order as to costs.

Decree confirmed.

G. B. R.

⁽¹⁾ (1900) 28 Cal. 37, 41.

⁽³⁾ (1888) 11 Mad. 327.

⁽²⁾ (1886) 8 All. 149.

⁽⁴⁾ (1890) 17 Cal. 670.

⁽⁵⁾ (1904) 6 Bom. L. R. 728.

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APPELLATE CRIMINAL.

1905

August 9.

Before Mr. Justice Russell and Mr. Justice Aston.

EMPEROR v. BUDHOOBAL.*

City of Bombay Municipal Act (Bombay Act III of 1888), sections 410, 24, Sch. D. (4)†—Prohibition of sale of fish except in a market—Sale from a

* Criminal Appeal No. 75 of 1905.

† The provisions of the City of Bombay Municipal Act (Bom. Act III of 1888) referred to run as under :—

410. (1) Except as hereinafter provided, no person shall, without a license from the Commissioner, sell or expose for sale any four-footed animal or any meat or fish intended for human food, in any place other than a municipal or private market.

(2) Provided that nothing in sub-section (1) shall apply to fresh fish sold from, or exposed for sale in a vessel in which it has been brought direct to the seashore after being caught at sea.

Section 24 (3). Unless and until they are so altered or re-apportioned, the number and respective boundaries of the wards and the number of councillors to be elected for each ward shall be as specified in Schedule B.

Consecutive Number.	Name of Ward.	Boundaries.				Number of members of the Corporation to be elected for each Ward.
		On the North.	On the South.	On the East.	On the West.	
4	Girgaon Ward.	A line starting from the north-west corner of Trimbak Parashram Street and extending along the south side of Grant Road as far as the B. B. & C. I. Railway, and again from the B. B. & C. I. Railway level crossing on Clerk Road along the south side of Clerk Road as far as the south end of Hornby Vellard.	Back Bay from a point opposite to Thakurdwar Street to Malabar Point.	A line starting from Back Bay at a point opposite Thakurdwar Street, and extending along the north side of Thakurdwar Street; south-west side of part of Bhuleshwar Street as far as the southern end of Ardesir Dady Street; thence along the west side of the latter and Trimbak Parashram Street as far as Grant Road; again from the Grant Road Railway Bridge along the west side of the B. B. & C. I. Railway Line as far as the Clerk Road level crossing.	The sea from Malabar Point to the south end of Hornby Vellard.	Five.

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*basket placed on the Chowpatti foreshore—Sale from a vessel—Private market—Onus of proof—City of Bombay, limits of—Bombay General Clauses Act (Bom. Act I of 1904), section 3 (10).**

The accused, a fisherwoman, was charged under section 410 (1) of the Bombay City Municipal Act (Bom. Act III of 1888), with selling or exposing for sale, without a license from the Municipal Commissioner, fish intended for human food, on the Chowpatti foreshore, in the City of Bombay. The sale was from a basket, which the accused had placed on the sand, at some distance from the water, between the high and low water mark. The fish sold was fresh fish and was brought from one of the boats then in Back Bay. The Presidency Magistrate acquitted the accused on the grounds that (1) the Bombay City Municipal Act did not apply as the place of sale was outside the limits of the City of Bombay as laid down in the City of Bombay Municipal Act; (2) section 410 of the Act had no application because the place was a private market established from time immemorial; and (3) the sale fell within section 410 (2) of the Act. On appeal, against this order of acquittal, by the Government of Bombay :—

Held, reversing the order of acquittal and convicting the accused, that the accused was not protected by section 410 (2) of the Bombay City Municipal Act (Bom. Act III of 1888), since it was impossible in the present case to say that the fish had been sold from a vessel, when as a matter of fact it had been sold from the basket on the shore, it having been brought from the vessel which was in the water.

Held, also, that the onus of proving that the place in question was a "private market" lay upon the accused.

Held, further, that the Bombay City Municipal Act (Bom. Act III of 1888) applied to the spot in question, because it came within the expression "City of Bombay" as defined by the Bombay General Clauses Act (Bom. Act I of 1904).

APPEAL under section 417 of the Criminal Procedure Code (Act V of 1898), from an order of acquittal passed by Chunilal H. Setalvad, Acting Fourth Presidency Magistrate of Bombay.

The accused was charged under section 410 of the City of Bombay Municipal Act (Bombay Act III of 1888), with selling or exposing for sale without license from the Municipal Commissioner fish intended for human food, on the Chowpatti foreshore on the 5th October 1904 at 8 A.M.

On the morning in question, two Municipal officers accompanied by a Sub-Inspector Ramchandra went to the Chowpatti foreshore and there the Sub-Inspector purchased one pamphlet for one anna

* 3. (10) "City of Bombay" shall mean the area within the local limits for the time being of the ordinary Original Civil Jurisdiction of the Bombay High Court of Judicature.

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from the accused. It was sold by the accused from a basket which she had placed on the sand at some distance from the water. At this time, there were at the place half a dozen persons similarly selling fish and some customers buying them. The fish sold was fresh and was brought from a vessel which was lying in the Back Bay.

It was stated on behalf of the prosecution that the place where the fish was sold not being either a Municipal or a private market the accused could not sell it there without a license from the Municipal Commissioner, and that, inasmuch as the fish in question was sold from a basket and not from a vessel in which it had been brought direct to the seashore after having been caught at sea, the accused was not protected by clause 2 of section 410 of the City of Bombay Municipal Act (Bom. Act III of 1888).

The accused, in defence, contended that the provisions of the City of Bombay Municipal Act, 1888, did not apply to the place of sale, which was below the ordinary high water line of the sea; that the place in question was a market, the rights of which had been acquired by prescription; and that it was a private market (section 398 of the Act) to which the provisions of section 410 of the Act did not apply; and that the accused was protected by clause 2 of section 410, since the fish sold was transferred into the basket from the vessel which was lying in the Back Bay.

The Magistrate held that the City of Bombay Municipal Act (Bom. Act III of 1888) did not apply as the place of sale was outside the limits of the City of Bombay as laid down in the Act; that section 410 of the Act did not apply as the place was a private market established from time immemorial; and that the sale in question fell within clause (2) of section 410 of the Act. In the result, he acquitted the accused under section 245 of the Criminal Procedure Code (Act V of 1898).

Against this order of acquittal the Government of Bombay appealed to the High Court.

Raikes, acting Advocate General, (with him *E. F. Nicholson*, Public Prosecutor), for the Crown:—The prosecution was brought by the Bombay Municipality for breach of the provisions of section 410 of the City of Bombay Municipal Act (Bombay Act III of 1888). The accused was found selling fish on the

Chaupati beach between high and low water mark. As to the exact distance of the place of sale from the sea-water there is some discrepancy in the evidence.

We submit that the provisions of the City of Bombay Municipal Act (Bombay Act III of 1888), apply to the place in question. The Act applies in so many words to the "City of Bombay" (section 1). The expression "City of Bombay" as defined by the Bombay General Clauses Act (Bombay Act I of 1904) means "the area within the local limits for the time being of the ordinary original civil jurisdiction of the Bombay High Court of Judicature." This signifies that "City of Bombay" bears this meaning, whenever it is used in the City of Bombay Municipal Act, unless there be anything repugnant in the latter Act. And there is nothing repugnant to it in the City of Bombay Municipal Act. Now, the place in question is indisputably within the limits of the ordinary original civil jurisdiction of the Bombay High Court.

[ASTON, J.—Do you refer us to any authority by which the local limits of the ordinary original civil jurisdiction of the Bombay High Court are defined?]

The local limits of the ordinary original civil jurisdiction of the Bombay High Court are defined in the Amended Letters Patent, section 11 (High Court Rule Book, p. 122). There is no law passed by the Governor General of India in Council as indicated in that section. So one has to go from that to the original Letters Patent of the Bombay High Court, section 11 (High Court Rule Book, p. 100). This again refers back to the Supreme Court Charter (High Court Rule Book, p. 23); which again refers to the Charter of the Mayor's Court, which mentions "Towns, Factories or places called Bombay."

Section 24 of the City of Bombay Municipal Act (Bombay Act III of 1888) enacts that for the purposes of election, the City shall be divided into wards: and the limits of these wards are defined in schedule B to the Act. This, however, cannot constitute a definition of "City of Bombay." The wards simply exist for the purposes of elections, and the Act does not say that every part of the City is included in the wards.

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[RUSSELL, J.—The definition of "City of Bombay" enacted in the Bombay General Clauses Act (Bombay Act I of 1904), applies to all Acts passed by the Bombay Legislature, unless there be anything repugnant in an Act.]

The City of Bombay Municipal Act takes the City as defined by the General Clauses Act and divides it into wards temporarily for purposes of election. The fact that the wards and the city limits are not coincident appears from the fact that the corporation has power to alter the boundaries of the wards with the sanction of Government.

If schedule B of the Act be referred to, the place in question seems to lie within the boundaries of the City of Bombay, according to accepted principles of construction. The Magistrate says the beginning of Back Bay must be the high tide. The fallacy in the reasoning of the Magistrate is that you must include in the Back Bay every part of land uncovered by tide. I am not able to understand the reasons which led the Magistrate to that conclusion. He simply postulates. Again, in the same schedule, in No. 1 the whole of the harbour is included in Ward No. 1. If the reasoning of the Magistrate is carried further, the whole of the Colaba reclamation would be outside the ordinary original civil jurisdiction of the Bombay High Court. Refers also to sections 386, 387, 388 and 389 of the City of Bombay Municipal Act (Bombay Act III of 1888).

The next point is whether the place in question is a private market. Under the City of Bombay Municipal Act (Bombay Act III of 1888), a private market is a non-municipal market. But it remains to be seen whether it is a market at all; and then the question arises upon whom does the burden of proving it rest. If the accused protects herself from this prosecution on the ground that she sells fish in a market, then obviously she must prove it. Suppose the woman had been convicted of the offence, could the conviction be set aside by the fact that the Municipality had not proved that the sale was not in a market? The land as a rule is not a market. And the evidence in the case upon the point is all vague and is evidence of repute. The evidence is technically inadmissible; and apart from that, such evidence is absolutely worthless. See also, Ameer Ali and

Woodroffe's Evidence Act, 3rd Edition, p. 352; *Patel Vandravan v. Patel Manilal*⁽¹⁾; and *Musammat Shafiq-un-Nisa v. Khan Bahadur Raja Shaban Ali Khan*⁽²⁾.

The last point turns upon the construction of section 410, clause (2) of the City of Bombay Municipal Act (Bombay Act III of 1888). The term 'vessel' according to the Bombay General Clauses Act (Bombay Act I of 1904) means and includes any ship or boat or any other description of vessel used in navigation. The proviso, therefore, does not apply to this case. The fish was sold and exposed for sale in a basket on the shore. The sale in question was begun, continued and ended on the foreshore, and the person who purchased the fish did not know that they were brought from the vessel. The proviso to the section was only intended to protect the wholesale sale of a particular catch to a dealer.

Strangman (instructed by *Smetham, Byrne and Noble*) for the accused:—Taking the last point urged by the learned Advocate General first, we submit that the proviso to section 410 of the City of Bombay Municipal Act (Bombay Act III of 1888) affords a complete protection to the accused. In this case the accused brought the fish from the vessel in a basket on the shore and there sold them. The basket is merely a means of carriage and the sale is really from the 'vessel.'

As to the second point, we contend that the area over which a Municipal Corporation has ordinary jurisdiction are the portions which are described in schedule B to the City of Bombay Municipal Act. There the Girgaon ward is described as bounded on the west by the sea from Malabar point to the south end of Hornby Vellard. The construction to be placed on 'sea' is the sea which forms the Back Bay: and the sea includes the portion of land covered by the high-water mark: see Hall on Sea-shore (2nd Edn.), p. 17.

Section 24 of the City of Bombay Municipal Act shows the ordinary Municipal limits. And, therefore, we are not concerned with the limits of the "City of Bombay" as defined in any other Act.

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(1) (1890) 15 Bom. 565.

(2) (1904) 31 L. A. 217.

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Turning, then, to the only remaining point whether the place is a private market, we find, on referring to Stroud's Judicial Dictionary, Wharton's Law Lexicon and Webster's Dictionary of the English Language, that market ordinarily means a place of sale. According to Webster, the market must be by grant or by immemorial user; and there is ample evidence in this case to show that the fish are sold at the place in question from time immemorial. It is for the prosecution to show that the place is a private market. Market is either an appointed place of sale or at an appointed time and place of sale. Time is not of the essence in its meaning. The ordinary dictionary meaning of the term is an appointed place for the purposes of sale.

[ASTON, J.—Is the market owned by any body ?]

The site belongs to the Collector of Bombay.

Raikes was heard in reply.

Cur. adv. vult.

RUSSELL, J. :—The accused herein Budhoobai, widow of a fisherman Rama Kamla, was charged before Mr. Setalvad, Acting Presidency Magistrate, with selling and exposing for sale, without license from the Municipal Commissioner, fish intended for human food on the Chaupati foreshore on the 5th October 1904, at 8 A.M. contrary to the provisions of section 410 (1) of the Bombay Municipal Act III of 1888. It appears that on the morning in question two Municipal Officers, accompanied by a Sub-Inspector named Ramchandra Lagu, went to the Chaupati foreshore and there the said Sub-Inspector bought one pomfret for one anna from the accused. It was sold by the accused from a basket which she had placed on the sand at some distance from the water. The witnesses are not agreed as to the exact distance, but it may be taken that the fish was sold between the high and low water mark. At the time this fish was sold there were several other fisher people selling fish and other people were buying from them. It is proved, we think, that the fish sold was fresh fish and that it had been recently brought from one of the boats then in the Back Bay. The deceased husband of the accused was a fisherman owning two tonies, a large and a small one, and she is now the owner of them. It would appear,

although it is not quite clear, that the fish that was sold to the Sub-Inspector was taken out of one of her tonies.

The first question we shall discuss is, is the accused protected by the provisions of section 410 of the Municipal Act which runs as follows:—

“(1) Except as hereinafter provided, no person shall, without a license from the Commissioner, sell or expose for sale any four-footed animal or any meat or fish intended for human food, in any place other than a municipal or private market :

“(2) Provided that nothing in sub-section (1) shall apply to fresh fish sold from, or exposed for sale in, a vessel in which it has been brought direct to the sea-shore after being caught at sea.”

The proviso is very ungrammatical and by no means easy to construe. The relative “ which ” refers to “ vessel ” whereas the words “ caught at sea ” refer to “ fish ” and the whole sentence from “ in which ” to “ sea ” is intended to be what in German grammar is known as a compound adjective. Treating this whole sentence in that way the proviso is, we think, worded so as not to interfere with the exposing or selling of fish in and from vessels coming direct from the sea. The allocation of the prepositions “ in ” and “ from ” seems to show this. Three processes seem to be aimed at and the proviso should then run as follows:—Nothing in sub-section 1 shall apply to fresh fish (1) caught at sea ; and (2) brought direct to the sea-shore and (3) sold from or exposed for sale in a vessel. The draftsman of the proviso, however, thought fit to put the processes in their reverse order and thereby has given occasion for this difficulty. Directly any fresh fish is brought on to the shore the prohibition of clause 1 attaches, but the prohibition is not intended to apply to anything which has not been actually brought on to the shore. It would be impossible in the present case to say that this fresh fish had been sold from a vessel, when as a matter of fact it had been sold from the basket on the shore, it having been brought from the vessel which was in the water. We have been unable to find any direct authority on this point but the case of *Playford v. Mercer*⁽¹⁾ supports our conclusion. In that case a cargo

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of ice was consigned to the plaintiff, and before the ship came into the harbour the defendants bought the cargo with a condition that the ice was to be taken from the ship's deck by them. It was held that the contract "from the deck" meant that the vendor should pay all that was necessary to enable the purchaser to remove the cargo from the deck, and that harbour dues charged to be paid before the goods could be removed, were payable by the vendor. Applying that case to the present—suppose here Budhoobai had agreed to sell the pomfret "from the tony," and then had paid a charge for putting it into the basket and taking it to shore surely the purchaser would have had to pay that charge.

The next question to consider is whether it can be said that the place where this fish was sold is a "private market" and upon whom does the burden lie to prove it to be such. Now no attempt has been made to show that there are any limits to be placed upon the foreshore in question so as to constitute a fixed market. It was suggested that a space of some 100 yards in width and length might be considered as the limit, but there is really no evidence whatever to support that suggestion. Therefore the whole foreshore of Chaupati must, according to the argument of the accused, be taken to be "private market." "Private market" is defined by section 398 of the Act which says:—"All markets which belong to or are maintained by the Corporation shall be called 'Municipal markets.' All other markets shall be deemed to be private." It is difficult to see how a place like the whole of the foreshore of Chaupati could be held to be a "private market." Even however if this were not so, we must next consider upon whom in this case lay the onus of proving that the place in question was a "private market." Now upon that point the Municipality started their case by showing that the place in question was the foreshore of Chaupati. That therefore was sufficient to throw the onus upon the defendants to prove that the foreshore of Chaupati was a "private market" within the meaning of the Act. Now upon this point a certain amount of evidence was given and a great deal was made of the admission by Mr. C. B. Shroff in cross-examination that the fishermen in general have been in the habit of using the

Chaupati foreshore for fishing from time immemorial and also for selling fish there. Afterwards he said he could not say that the fishermen were selling fish there from time immemorial and his own knowledge had been only for 10 years. Certain other evidence was given by the witnesses for the accused but the conclusion we have come to upon that point is that the accused has not discharged the burden which we find was laid upon her by the evidence that she has called. To legally prove immemorial custom for selling fish on the Chaupáti foreshore would require very much better and further evidence than has been given in this case: *e.g.*, *Mercer v. Denne* ⁽¹⁾ shows what evidence was necessary to prove a valid and good custom for fishermen to dry their nets upon the shore of the land of a private owner. As we have said the evidence in this case falls far short of the evidence which was given in support of the custom in that case. Of course this judgment will not prevent the fishermen who are interested in this alleged custom from filing a civil suit to prove the custom and to protect their rights if any. Whether it is worth their while to do so is for them to consider, for in order to avoid any penalty hereafter all they need do is to haul their tonies a little higher on to the sea-shore and expose their fish in and sell them from them direct.

The last question is, whether the Municipal Act applies to the spot in question. We have no doubt whatever that it does. *Prima facie* the foreshore between high and low water marks belongs to the crown: see *Attorney-General v. Richards* ⁽²⁾ and *Attorney-General v. Emerson* ⁽³⁾. The same law applies in India. *Doe d. Rajah Seebkristo v. The East India Co.* ⁽⁴⁾. The Municipal Act, sections 387—389, certainly contemplate parts of the sea-shore being vested in and parts not being vested in the Municipality. But there is nothing to show that the Chaupáti foreshore is so vested. The Presidency Magistrate seems to have considered that the City of Bombay is defined in detail in the Municipal Act, because the boundaries of the wards are set out in schedule B into which the city is divided. But it is clear from section 24 that these boundaries are given for electoral

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(1) [1904] 2 Ch. 534.

(2) (1795) 3 R. R. 632.

(3) [1891] A. C. 649.

(4) (1856) 6 Moo. I. A. 267.

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purposes only ; and further "City" in section 24 must be read subject to the qualification in section 3, at the beginning "unless there is something repugnant in the subject or context," wherefrom it appears that in section 24 "City" is not equivalent to the City of Bombay or the whole area to which the Municipal Act applies. The word "City of Bombay" under the General Clauses Act I of 1904 means the area within the local limits for the time being of the Ordinary Original Civil Jurisdiction of the Bombay High Court of Judicature : see clause 10 ; and by section 4 the word "City of Bombay" as defined in section 3 of that Act applies also, unless there is anything repugnant in the subject or context of Bombay Acts passed before the commencement of Act I of 1904. We do not find anything repugnant in the subject or context in the Bombay Municipal Act. There is no doubt therefore the foreshore in question is within the Ordinary Original Civil Jurisdiction of the Bombay High Court of Judicature, consequently this point also fails the accused.

The result is that in our opinion the order of the Acting Presidency Magistrate was wrong, the accused ought to have been convicted of the offence with which she was charged.

We accordingly reverse the order of acquittal and direct that she do pay a fine of two annas, or, as section 26 of the Bombay General Clauses Act I of 1904 applies, by which section 67 *inter alia* of the Indian Penal Code is rendered applicable in the case of fines imposed under any Bombay Act, we order the accused do suffer simple imprisonment for one day in default.

ASTON, J.—I concur in the order proposed. The evidence establishes that the accused exposed for sale and sold the fish in question after it had been removed, unsold, from a boat and had been taken to the shore and had been placed on the shore in the basket in which it was exposed for sale on the shore. This is prohibited by section 410 of the City of Bombay Municipal Act unless the place of sale or exposure is a market.

The spot where this exposure and sale took place is part of the Chaupāti foreshore, between high and low water mark, which *primâ facie* belongs to the Government and in which no proprietary rights are claimed by the accused for herself or any private individuals. It is *primâ facie* not a market place and the evidence

to which we were referred to show that this foreshore or any part of it is a market is too indefinite as to place, time and circumstance to show that the Chaupáti foreshore is in whole or in part a market place.

I also concur in the view that in applying the provisions of section 410 of the City of Bombay Municipal Act, the decision whether the Chaupáti foreshore between high and low water-mark is within the City of Bombay is governed by the definition of "City of Bombay" contained in the Bombay General Clauses Act and not by certain provisions of the City of Bombay Municipal Act which divide "the City" into wards for electoral purposes. On this view of the case the accused has committed an offence punishable under the section cited, but the prosecution being avowedly instituted merely as a test case, a nominal fine is sufficient.

R. R.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

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THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), APPELLANT, *v.* VAMANRAV NARAYAN CHIPLUNKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

August 16.

Cantonment property—Grant—Notice of resumption—Offer of compensation—Condition precedent—Notice to one of three executors—Joint occupants.

A certain plot known as No. 1, Queen's Gardens, situate within the limits of the Poona Cantonment, was in the year 1862 granted by the Commander-in-Chief of the Bombay Army to one Edalji Nasarvanji Colabavala under the terms of a General Order, dated the 31st July 1856. The 14th clause of the said General Order was in these terms:—

"Permission to occupy such ground in a military cantonment confers no proprietary right, it continues the property of the State.

"It is resumable at the pleasure of Government, but

"In all practicable cases one month's notice of resumption will be given, and

"The value of the buildings which may have been erected thereon, as estimated by a committee, will be paid to the owner."

* Appeal No. 27 of 1905.

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After the grant the grantee erected a bungalow on the plot and in the year 1874 sold the bungalow and all his interest in the land to Hari Ravji Chiplunkar who died in the year 1896 leaving a will under which he appointed defendants 1—3 as executors.

On the 19th October 1903 the Military authorities gave to defendant 1 a notice requiring him to deliver possession of the land to the Cantonment Magistrate on the 1st December following. The notice further stated that Government was prepared to pay defendant 1 Rs. 15,500 as compensation for all the buildings standing on the land, or if the defendant disputed the said amount, then such amount as may be determined by a Committee of Arbitration and that on defendant's failure to comply with the terms of the notice a suit in ejectment would be filed. The defendants having failed to comply with the notice, the Secretary of State for India in Council brought the present suit in the year 1904 to recover possession of the land claiming that "there is a right of resumption which is presently exercisable."

Defendants 1—3 denied the right and contended that the notice of resumption was not proper, and that the plaintiff had no right to resume the value of the buildings being not estimated by a committee.

Defendant 4, who was a lessee of defendants 1—3, expressed his willingness to abide by the orders of the Court as to giving up possession.

The Judge having dismissed the suit on the ground that the notice to give up possession was not proper and was not given to the proper parties, the plaintiff appealed.

Held, reversing the decree that the General Order stated in terms as clear as possible that no proprietary right was conferred by reason of a permission to occupy the ground which alone was granted, and that the ground continued the property of the State and was resumable at the pleasure of Government.

Held further, that the notice of resumption was not a condition precedent to the right of resumption. Even assuming that notice was a condition precedent, that provision had been satisfied by giving notice to one of the three executors who were joint occupants. The provision as to notice was nothing more than a statement of what will be done, when practicable, for the purpose of saving the occupant from such inconvenience as an immediate resumption might involve.

Held further, that though the value of the buildings erected had not been estimated by a committee, it was not a condition precedent to resumption, though, no doubt, the right to that payment would arise on resumption.

Secretary of State v. Jagan Prasad⁽¹⁾ distinguished.

APPEAL against the decision of A. Lucas, District Judge of Poona, in original suit No. 10 of 1904 brought by the Secretary of State for India in Council to recover possession of certain land, situate within the limits of the Poona Cantonment.

(1) (1834) 6 All. 148.

On the 1st November 1862 one Edalji Nasarvanji Colabavala having applied to the Military authorities for permission to occupy a certain piece of land, situate within the limits of the Poona Cantonment, for the purpose of erecting a dwelling house and out-houses, the Commander-in-Chief of the Bombay Army sanctioned the grant of a plot, which was then known as No. 27, Staff Lines, and subsequently as No. 2, Bund Lines, and latterly as No. 1, Queen's Gardens. The grant was made on the 11th December 1862 under Government Separate General Order of the 31st July 1856, which *inter alia* provided as follows:—

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a.—An application must be made to the Officer Commanding the Station in form A for unoccupied ground to be built upon within Cantonment limits.

b.—When no objection occurs, the application is to be forwarded to the Commander-in-Chief who, if he approves, will submit it for the orders of Government.

c.—Permission to occupy such ground in a Military Cantonment confers no proprietary right, it continues the property of the State.

d.—It is resumable at the pleasure of Government, but

e.—In all practicable cases one month's notice of resumption will be given, and

f.—The value of the buildings which may have been erected thereon as estimated by a committee will be payable to the owner.

g.—Committees of Arbitration under this order are to be composed of 5 officers having no interest in the subject of reference specially selected for their judgment and experience and when practicable of not less than 10 years' standing, the owner being called in and allowed to name one member (if a Military Officer at the station).

h.—The value of buildings for compensation is to be determined as nearly as possible according to their actual value at the time. The value fixed being as nearly as can be ascertained the cost of constructing at the time being, a similar building.

The said plot was, thereupon, occupied by the said Edalji Nasarvanji Colabavala who erected a bungalow thereon. In the year 1874 the grantee sold the said bungalow and plot of ground to Hari Ravji Chiplunkar and the sale was sanctioned by the Major General Commanding the Poona Brigade in accordance with the Contonment Regulations. The said Hari Ravji died in March 1896 having left a will under which he appointed Vamanrav Narayan Chiplunkar, Balvantrav Hari Chiplunkar and Ganpatrao *alias* Ganpatgir Bholagir, defendants 1, 2 and 3,

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as executors and they continued in possession of the bungalow and the plot.

On the 19th October 1903 the Deputy Adjutant-General, Bombay Command, under the direction of the Government of Bombay, gave on behalf of Government a notice to the executor Vamanrav Narayan Chiplunkar, defendant 1, requiring him on the 1st December following to quit and deliver up to the Cantonment Magistrate, Poona, possession of the said plot of ground and intimating that Government was prepared to pay him the sum of Rs. 15,500 as the value of all the buildings standing on the said plot, or if he disputed the said amount then such amount as might be determined by a Committee of Arbitration which would be constituted as provided in Chapter XX of the Cantonment Code, 1899, and that on defendant's failure to comply with the terms of the notice, a suit in ejectment would be filed. On the 28th November 1903 the Cantonment Magistrate, Poona, wrote to Vamanrav Narayan Chiplunkar, defendant 1, a memo stating that the latter should arrange to deliver charge of the premises on the 1st December. In reply to the said memo Vamanrav Narayan Chiplunkar informed the Cantonment Magistrate that he would not give up possession and that in case a suit in ejectment be instituted against him, he would defend the same.

The plaintiff, therefore, brought the present suit in the year 1904 alleging that the cause of action arose on the 1st December 1903 and that the defendants held the land on Military or Cantonment tenure under which the holder had no right of ownership over the ground, but merely a right of occupancy and the land was resumable at the pleasure of Government, compensation being given for any buildings standing upon it at the time of resumption. The plaintiff prayed that the defendants might be decreed to deliver up quiet and peaceable possession of the said plot of ground to the plaintiff and that the defendants or some of them might be decreed to pay to the plaintiff his costs of the suit. The suit was valued at Rs. 40,000.

Defendant 1, Vamanrav Narayan Chiplunkar, answered *inter alia* that he did not admit that the plot in suit was acquired or held by Colabavala under the kind of "tenure" described by

the plaintiff, nor had the defendant any knowledge of any such tenure as was described in the plaint as "Military or Cantonment tenure," that he did not admit that the plot was granted with any such reservation of the right of resumption in favour of Government, that he had no knowledge of the Cantonment Regulations referred to in the plaint nor had the deceased Hari Ravji notice of any such Regulations at the time of his purchase, nor had Colaba vala any such notice at the time of the grant, that the notice of resumption was not proper, that the plaintiff virtually asked for specific performance of an alleged unwritten undertaking not between the parties, as against the executors of Hari Ravji, a transferee who had paid money in good faith and without notice of the alleged reservation and who claimed under a registered document acted upon by the plaintiff, who was, therefore, not entitled to the relief claimed under the provisions of the Specific Relief Act; that the plaintiff was estopped from asserting any right to "resume" the land which had always been held and dealt with by defendants, Hari Ravji and his vendor, as their absolute property free from all liability to resumption and that in the event of the Court passing a decree as prayed for in the plaint, the defendant claimed Rs. 55,000 for the damage that will be caused to him.

Defendants 2 and 3, Balvantrav Hari Chiplunkar and Ganpatrao *alias* Ganpatgir Bholagir, stated that defendant 1 was not the managing executor, the provision in Hari Ravji's will being that all business should be transacted *jointly* and by *majority* of votes, that notice to defendant 1 was insufficient, that no notice was given to them, therefore, there was no cause of action and the plaintiff was not entitled to claim possession and that neither the Cantonment Act, 1889, nor the Cantonment Code, 1899, provided for the resumption of land and for the determination of compensation in such cases.

While the suit was proceeding defendant 2 died and his name was struck off as the right to sue did not survive against his heirs.

Defendant 4, Sir Dinshaw Manekji Petit, who was lessee under defendants 1-3, answered that he was willing to abide by the orders of the Court as to giving up possession and prayed

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that if the plaintiff was entitled to possession, reasonable time might be given to him to vacate.

The Judge found that the notice given by the plaintiff was not proper and was not given to proper parties. He, therefore, dismissed the suit without recording findings on other issues. The following are extracts from his judgment:—

Assuming then that Mr. Colabavala took the land on these conditions (*a, b, c, d, e, f, g, h*, mentioned above) and that his successors-in-title now hold it on the same conditions, it is to be determined on what terms plaintiff can claim that the present defendants shall vacate the land.

Mr. Nicholson (Government Solicitor who appeared for the plaintiff) would have me assume that there is no mutuality about the arrangement between plaintiff and defendants, that the plaintiff can put an end to the occupation at any time at his will and pleasure and that the question of compensation is a matter to be settled afterwards and is quite distinct from plaintiff's right to resume the land. This, as a Court of equity, I cannot allow to be a correct statement of the case. I must hold that the consideration for plaintiff allowing defendants to build on the land was that they should erect upon it a bungalow suitable for occupation by British Officers and should become liable to the rules in force within Cantonment limits many of which are of an irksome nature. Mr. Nicholson is unable to point out to me what is the nature of defendants' agreement with Government if it is not a contract pure and simple. I therefore decide that plaintiff and defendant are parties to a contract. Such being the case, in my opinion, it follows that before he can evict defendants plaintiff must

(1) if practicable give 1 month's notice of resumption, and

(2) pay or at all events show his willingness to pay compensation fixed by a committee constituted as shown above and calculated in the manner shown above.

* * * * *

I now turn to notice (B attached to the plaint) to see how far plaintiff has shown his willingness to compensate defendants according to the agreement between them when he demands that defendants shall vacate the land.

By paragraph 1 of the notice plaintiff calls upon defendants to quit and vacate the premises in suit on the first day of December next following. His offer as to compensation is contained in paragraph 2 which I will quote in full.

"And I hereby further under direction as aforesaid give you notice that Government offer and are prepared to pay you the sum of Rs. 15,500 as the value of all erections now standing on the land or if you dispute the amount of the said compensation then such amount as may be determined by a Committee of Arbitration which shall be constituted as provided by Chapter XX of the Cantonment Code, 1899."

In the event of his not complying with the terms of this notice defendant 1 is informed in paragraph 4 that an action in ejectment will be filed against him in the Poona District Court.

To this notice defendant 1 replied (*vide* C attached to the plaint) "I cannot grant the possession of No. 1, Queen's Gardens, as desired."

The question which now arises is was he justified in so replying or has he by so doing committed a breach of his contract? The notice given to him really amounts to the following :—

"Quit the land by December 1st, 1903. I offer you Rs. 15,500 for the building. If you won't accept that, the amount of compensation to be paid will be fixed by an Arbitration Committee constituted under Chapter XX of the Cantonment Code." Defendant 1 was, in fact, given an unconditional order to quit. But for the following reasons he is entitled to something much more than this. According to his agreement he is entitled to have the compensation to be paid to him first fixed in the manner laid down by the order of 1856 or to be given an opportunity of agreeing to the compensation being so fixed. He was not given any such opportunities but was told to quit unconditionally.

It does not appear how the sum of Rs. 15,500 was fixed but it is not contended that it was fixed in the manner prescribed by the order of 1856. If he did not accept Rs. 15,500 he was referred to a Committee that was never contemplated in the agreement between him and plaintiff. Moreover a Committee appointed under Chapter XX of the Cantonment Code has no powers to fix compensation in a case like this. I, therefore, hold that plaintiff has neither performed nor shown his willingness to perform the promises made by him to the defendants and that until he has done this he has no cause of action against defendants for breach of contract by refusing to vacate the land as required by the notice to defendant 1.

Apart from the purely legal aspect of the case I am of opinion that on equitable grounds also plaintiff's suit must fail. It is quite conceivable that had defendant 1 been asked to accept compensation fixed in the manner prescribed by the order of 1856 he might in order to avoid the trouble and expense of litigation have accepted compensation so fixed even though he did not admit plaintiff's right to evict him. At all events it does not appear to me to be fair that plaintiff with inexhaustible resources at command should hurry the defendants into litigation without complying to the letter with the conditions of the agreement between them.

The plaintiff appealed.

Scott (Advocate General) with *Rao Bahadur V. J. Kirtikar*, Government Pleader, appeared for the appellant (plaintiff) :—The action is one in trespass against persons who hold the land under a revocable license. Clause 14 of the General Order of July 1856 is quite clear on the point. According to the terms of that order the land was resumable at the pleasure of Government and notice to give possession was not at all necessary. In giving the notice which is now alleged to be insufficient, we did more than we

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were bound to do by the terms of the order. The defendants refused to quit, therefore, they lost all claim to the performance of our undertaking.

The Judge misunderstood the nature of our claim. He should have held that it was a case in trespass. The defendants held the land under permission revocable at the will of Government and Government having effected revocation by their notice of the 19th October 1903, the defendants became trespassers.

The determination and the payment of the amount of compensation was not a condition precedent to such revocation. In the case of *The Secretary of State for India v. Jagan Prasad*⁽¹⁾, in which the payment of compensation was held to be a condition precedent to ejectment, the Court did not dismiss the suit, but passed a decree empowering the Secretary of State to eject the defendant conditionally on his making a formal tender of the amount of compensation fixed by a Committee of Arbitrators. But in the present case payment of compensation is not a condition precedent to ejectment.

[JENKINS, C. J.:—Will you undertake not to execute the decree until the amount of compensation is determined?]

Yes, we will do that.

J. P. Souza appeared for respondent 1 (defendant 1).

G. S. Rao (and *Venkatrao Ramchandra*) appeared for respondent 2 (defendant 3):—The General Order of 1856 was not referred to in the notice given to one of the executors. It was put in afterwards. The grant was made to us by Government and it was the grant of a building site. Even if the General Order did apply to the land, the determination and payment of compensation as provided for in it are conditions precedent to the exercise by Government of the right of resumption. As long as there was no offer by the plaintiff to submit to a reference to arbitration, he could not exercise the right of resumption.

Next we contend that the notice was bad because it was given to only one out of the three executors. According to the will of the deceased Hari Ravji Chiplunkar all the three executors or a majority of them must join in doing an act.

H. C. Coyaji appeared for respondent 3 (defendant 4):—We do not contest the right of Government to eject. We are the

(1) (1884) 6 All. 148.

lessee of the bungalow under the executors and sufficient time should be allowed to us to vacate. We should not be saddled with plaintiff's costs.

JENKINS, C. J.:—The Secretary of State for India in Council has brought this suit to recover possession of cantonment property, claiming that there is a right of resumption which is presently exercisable.

The first three defendants deny this right, and, in a letter written by the first of them on the 30th November 1908, it is said "I cannot grant possession of No. 1, Queen's Gardens, as desired. If Government are advised, as they have hinted previously, to sue me for ejectment, I will defend if any such suit is instituted, and hold Government responsible for all the cost appertaining to such suit or suits as they or I may be advised to institute or defend."

The 4th defendant is a lessee under the first three defendants, and by his written statement he has expressed his willingness to abide by the orders of the Court as to giving up possession.

The land was granted in the year 1862 to Mr. Edalji Nasarwanji Colabawalla, and it is common ground that the grant was made on the terms of the General Order of the 31st July 1856. Though this General Order was not mentioned in the correspondence previous to the institution of the suit or in the plaint, by common agreement the District Judge has disposed of the case on the footing of the rights of the parties being governed by that General Order.

Mr. Edalji Nasarwanji Colabawalla erected a bungalow on the land, and in 1874 he sold the bungalow and all his interest in the land to Mr. Hari Ravji. The first three defendants are Mr. Hari Ravji's executors.

Now the clause of the General Order applicable to this case is the 14th which is in these terms:—"Permission to occupy such ground in a military cantonment confers no proprietary right, it continues the property of the State.

"It is resumable at the pleasure of Government, but

"In all practicable cases one month's notice of resumption will be given, and

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"The value of the buildings which may have been erected thereon, as estimated by a committee, will be paid to the owner."

It is there stated in terms as clear as possible that no proprietary right is conferred by reason of a permission to occupy ground, and that it was only a permission to occupy ground that was granted is apparent from Exhibit (a) to the plaint. It is further stated with all possible clearness that the ground continues the property of the State and is resumable at the pleasure of the Government.

But Mr. Rao, on behalf of the first three defendants, contends before us that in the following sentence there is that which enables him to resist this claim. He says that one month's notice was not given, and that the value of the buildings has not been estimated or tendered. He says that one month's notice was not given, because notice was only given to one of the three executors; and he relies for the validity of this contention on a clause in Mr. Hari Ravji's will which, we are told, provides that the assent of the majority of the executors is required for any act. But no act is required of the executors in this case.

The position is that the three executors are joint occupants, and even if it be assumed that notice is a condition precedent to the right of resumption, that provision has been satisfied by the notice being given to one. But in our view of the case the giving of notice is not a condition precedent. It appears to us to be nothing more than a statement of what will be done, where practicable, for the purpose of saving the occupant from such inconvenience as an immediate resumption might involve.

Then it is said that inasmuch as the value of the buildings erected has not been estimated by a committee and so cannot be paid, no right to resume exists. But (in our opinion) payment is not made a condition precedent to resumption, though no doubt the right to that payment would arise on resumption. The case of *Secretary of State vs. Jagan Prasad* ⁽¹⁾ is clearly distinguishable because there it was expressly provided that the power of resumption was on giving one month's notice, and paying the value of such buildings.

(1) (1884) 6 All. 148.

But any difficulty there might be in this respect is met by the assent of the Advocate General to the proposal that any decree for possession shall not be executed without the special permission of the Court until the value of the buildings has been estimated in the manner provided by the General Order, and by his further undertaking as soon as possible after the execution of the decree to pay the sum that may be so estimated. We say 'without the special order of the Court' with a view to safe-guarding the plaintiff against any possible hitch, which we cannot now foresee, that might perhaps interfere with our intention that the plaintiff shall recover possession upon the terms to which the Advocate General has assented on his behalf.

In our opinion there should be a decree to that effect, and the decree of the lower Court should be reversed with costs to be borne by the first three defendants. There will be no order as to costs against defendant No. 4.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Batty.

GIRJABAI BHRATAR GANGADHAR BALKRISHNA BHAT THAKAR
(ORIGINAL PLAINTIFF), APPELLANT, *v.* RAGHUNATH *alias* TATYA
VISHWANATH (ORIGINAL DEFENDANT), RESPONDENT.*

1905.

August 24.

Provincial Small Cause Court Act (IX of 1887), Sch. II, art. 31—Jurisdiction of Small Cause Court—Suit to recover an ascertained sum as profits of land—Second appeal—High Court—Practice.

The plaintiff sued to recover three specific sums of money amounting to Rs. 447-11-0, being her share of the revenues and profits of three sets of lands, alleging in her plaint that the money had been wrongly received by the defendant :—

Held, that the suit was one cognizable by a Court of Small Causes; and that, therefore, no second appeal lay.

SECOND Appeal from the decision of W. Baker, Assistant Judge of Poona, reversing the decree passed by G. V. Patwardhan, Subordinate Judge at Sáswad.

* Second appeal No. 183 of 1905.

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The plaintiff sued to recover from the defendant the sum of Rs. 447-11-0. The sum was made up as follows: Rs. 365-3-0 was her share of the revenues of the inam village of Valunja for three years 1899, 1900 and 1901; Rs. 52-8-0 on account of her share of the profits of the lands at Valunja; and Rs. 30 represented her share of the profits of the lands at Kamthadi, for the same years. The plaintiff alleged that the defendant had received the amounts mentioned but he had wrongly retained the same.

The defendant, in his written statement among other things denied the plaintiff's share in the inam village as well as the other lands.

The Subordinate Judge decreed the plaintiff's suit in his favour.

On appeal the Assistant Judge reversed the decree, and dismissed the suit.

The plaintiff preferred a second appeal.

At the hearing the respondent raised a preliminary objection that no second appeal lay as the suit was one cognizable by a Small Cause Court.

V. G. Ajinkya, for the respondent (defendant):—I take a preliminary objection that no second appeal lies—section 586 of the Civil Procedure Code (Act XIV of 1882); the present suit does not fall under Art. 31, Schedule II of the Provincial Court of Small Causes (Act IX of 1887), because this is not a suit for an account; the plaintiff in this case claims three specific sums, and thus the suit is of a nature cognizable by a Court of Small Causes; *Kunjo Behary Singh v. Madhub Chundra Ghose*⁽¹⁾, *Vasudev Narayan v. Damodar Waman*⁽²⁾.

N. M. Samarth, for the appellant (plaintiff):—There are three items claimed in the plaint. As to one of them, namely, the profits of Kamthadi lands, plaintiff, in paragraph 3 of the plaint, alleges that she had been receiving her share, but for the three years prior to suit, defendant had wrongfully received plaintiff's share of the profits of those lands. As the plaint contains that allegation, the suit falls under clause (31), schedule II of the Provincial Small Cause Courts Act (IX of 1887): *Damodar Gopal Dikshit v. Chintaman Balkrishna Karve*⁽³⁾; *Antone v. Mahadev*

(1) (1896) 23 Cal. (F. B.) 884.

(2) (1901) 6 Bom. L. R. 370.

(3) (1892) 17 Bom. 42.

Anant⁽¹⁾; *Rameshar Singh v. Durga Das*⁽²⁾. The head-note in *Vinayak Gangadharbhat v. Krishnarao Sakharam*⁽³⁾ is not correct in its statement that the suit in that case was to recover *utpan* of plaintiff's lands *wrongfully recovered by defendant*. There was no such allegation in that case. The misapprehension which the incorrect statement in the head-note was likely to lead to was corrected in *Vasudev Narayan v. Damodar Waman*⁽⁴⁾. In the case of *Vasudev v. Damodar* also, plaintiff did not allege in his plaint that defendant had *wrongfully received* plaintiff's share of the profits. The view of the majority of the Calcutta High Court in the Full Bench case of *Kunjo Behary Singh v. Madhub Chundra Ghose*⁽⁵⁾ has been expressly dissented from by our High Court in *Antone v. Mahadev Anant*⁽¹⁾. This case in *Antone v. Mahadev* was not brought to the notice of their Lordships in *Vasudev v. Damodar*⁽⁴⁾. The fact that plaintiff has claimed Rs. 30 as her share of the profits of Kamthadi lands for three years prior to suit at Rs. 10 per year cannot make her suit cognizable by the Court of Small Causes, when her allegation is that defendant had wrongfully received her share of the profits. In spite of the definite sum mentioned in the plaint, the Court has to ascertain whether the sum claimed is more or less than what plaintiff is entitled to. In the present case, the Court of first instance found that plaintiff was really entitled to Rs. 15 per year, but as she had claimed Rs. 10 per year, the decree in her favour was for Rs. 30 for three years. Thus, plaintiff's naming a definite sum in the plaint does not make the suit any the less a suit "for an account." Besides, as observed by Ghose, J., in *Kunjo Behary Singh v. Madhub Chundra Ghose*⁽⁵⁾, "if the Legislature had really intended that a suit must be a suit for account properly so called, in order to bring it within the words 'including a suit, &c.,' as occurring in art. (31), they would have stopped with the words 'any other suit for account' and would not have added those words." As the view of the minority of the Judges in the Full Bench case of *Kunjo Behari Singh* has been accepted in the case

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(1) (1900) 25 Bom. 85, at p. 89.

(2) (1901) 25 Bom. 625 : 3 Bom. L. R. 239.

(3) (1901) 23 All. 137.

(4) (1904) 6 Bom. L. R. 370.

(5) (1896) 23 Cal. 884 at p. 893.

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of *Antone v. Mahadev*⁽¹⁾, as being in accordance with the current of decisions in our High Court, and as that view has not been overruled by a Full Bench of our High Court, it is not open to this Court to depart from that view. I submit, therefore, that the preliminary objection ought not to prevail.

V. G. Ajinkya, in reply :—The case of *Antone v. Mahadev*⁽¹⁾ seems to create some doubt; but in that suit the claim was for profits “of three years” and not for any specific sum as claimed in the present case. The mere fact that the Court has to ascertain whether the sum claimed is more or less than what the plaintiff is entitled to does not make a suit one for an account; because in that way every suit whatever be its nature will become a suit for an account; in many cases something in the nature of an account is required to be taken, but a suit for account means a suit which seeks for a decree ordering the defendant to account to the plaintiff for moneys received by him and not for a definite sum of money. From the facts and arguments of pleaders as reported in *Vasudev v. Damodar*⁽²⁾ it seems that the question of wrongful receipt of the plaintiff’s share by the defendant was specifically before the Court and after all the Court held that the claim was one cognizable by a Court of Small Causes. The preliminary objection therefore ought to prevail and the appeal be dismissed with costs.

RUSSELL, J.:—In this case a preliminary point was raised, viz., that no second appeal would lie to this Court. The question arises upon Article 31 of the second Schedule of Act IX of 1887. The Article excludes from the cognizance of a Small Cause Court “any other suit for an account including...a suit for the profits of immoveable property belonging to the plaintiff which have been wrongly received by the defendant.” In the present case the plaintiff sues to recover three specific sums of money, her share of the revenues and profits respectively of three sets of lands. It is true that in para. 3 of her plaint, she says, that the profits had been wrongly received by the defendant.

Now clause 31 refers to suits for accounts, and it appears to us impossible to say that a suit for three specific items which

(1) (1900) 25 Bom. 85.

(2) (1904) 6 Bom. L. R. 370.

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are upon the face of the plaint itself, ascertained and defined, can be said to be a suit for an account. It was pointed out during the argument that a suit for an account was excluded from the cognizance of the Small Cause Court as it is well known that a Small Cause Court has no machinery for taking accounts. The question has been raised in several cases. In *Vinayak v. Krishnarao* ⁽¹⁾ the plaintiff sued to recover Rs. 75 as the income of certain lands. The defendant raised the question of title, but it was held that the suit although raising question of title was cognizable by the Small Cause Court. There, it will be seen, the form of the plaint is the same as in the present case, *viz.*, for a specific sum, the profits of certain lands. A certain amount of difficulty was occasioned in our minds at first by the fact that the case of *Antone v. Mahadev* ⁽²⁾ was not cited in *Vinayak v. Krishnarao* ⁽¹⁾. But *Antone v. Mahadev*, it appears, was brought by the plaintiff for the profits of three years. That is to say, it was not a suit brought for a specific sum of money but "profits of three years". It is obvious that to ascertain the profits for three years it was necessary or might be necessary to take an account to ascertain what these profits would come to. Then again in the case of *Wasudev v. Damodar* ⁽³⁾ it was held: "A suit by a co-sharer to recover his share of the profits of a *khoti takshim* recovered by another co-sharer is a suit cognizable by a Court of Small Causes; and if the claim is below Rs. 500, no second appeal lies as provided by section 586 of the Civil Procedure Code." And in this case the learned Chief Justice in delivering judgment explains the reason for the misapprehension which prevails as to the effect of *Vinayak v. Krishnarao* ⁽¹⁾* and says that the misapprehension arose from the form in which the head-note is framed, and that "the question under Article 31 in the Schedule to the Provincial Small Cause Courts Act was not considered in the judgment, as it was the opinion of the Court that the suit was not one for an account, but

* [The head-note of this case is correct in the case as reported in this Series. The allusion of the learned Judge to the incorrectness of the head-note refers to the case as reported in the Bombay Law Reporter. Ed.]

(1) (1901) 25 Bom. 625 : 3 Bom. L. R. 239. (2) (1900) 25 Bom. 85 : 2 Bom. L. R. 683.

(3) (1904) 6 Bom. L. R. 370.

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for a definite sum and so fell within the ruling of the majority of the Full Bench of the Calcutta High Court in the case of *Kunjo Behary Singh v. Madhub Chundra Ghose* (1).” Then again we have Second Appeal No. 736 of 1904 which is to the same effect.

Under these circumstances we do not think it necessary to refer this to a Full Bench. We will follow the Bombay decisions referred to, and hold that the preliminary objection must prevail.

We accordingly reject this appeal with costs.

B. R.

Appeal dismissed.

(1) (1896) 23 Cal. 884.

(2) Unreported.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1905.
August 29.

BINDAJI LAXUMAN TRIPUTIKAR (ORIGINAL OPPONENT), APPELLANT, v.
MATHURABAI (ORIGINAL APPLICANT), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), sections 39 and 52—Minors—Guardian of person—Guardian of property—Minor having proprietary interest with adults in joint family—Joint family comprising all minors—Guardianship liable to cease as soon as there is an adult person.

A guardian of the property cannot be appointed for a minor whose only proprietary interest is as co-parcener with adults in a joint family property.

This principle does not apply when all the co-parceners are minors and a guardian of the property is appointed for the whole number, *Lingungowda v. Gangabai* (1) followed.

As soon as there is an adult co-parcener, any guardianship of the property previously constituted either ceases or is liable to cease.

An order appointing a guardian of the property of minor co-parceners, who exclusively constitute the joint family, should reserve liberty to any minor on attaining majority to apply for the removal of the guardian of the property or restrictions of his power under section 52 of the Guardians and Wards Act (VIII of 1890).

APPEAL from the decision of W. Baker, Assistant Judge of Poona, appointing a guardian of the person and property of minors.

* Appeal No. 126 of 1904.

(1) (1896) P. J. p. 521.

The applicant, Mathurabai, widow of Vishnu Mahadeo, applied for a certificate of guardianship of the person and property of three minors, (1) Govind and (2) Gopal Mahadeo and (3) Keshav Sonu, aged respectively fifteen and thirteen years and eight months, alleging that the first two minors were the step-brothers of her deceased husband and the third minor was her grandson, that the minors were members of an undivided Hindu family, which possessed immoveable property worth about Rs. 9,500 at Poona, that the mother of the minors 1 and 2 was dead, that they were living with their maternal uncle in a village in Koregaum Taluka in the Satara District and that the applicant being the eldest member of the family consisting of herself and the minors, was entitled to the certificate.

Opponent Bindaji Laxuman Triputikar resisted the application on the grounds that he was the maternal uncle of minors 1 and 2 who were living with him, that the property of minor No. 3 was separate from that of minors Nos. 1 and 2, that he was in possession of some of the property belonging to the latter two and that the application was not *bonâ-fide* inasmuch as the object of the applicant was to get the property of the two minors into hotch-pot as joint property.

The Judge found that the separation alleged by the opponent was not proved and as the applicant was the eldest member of the family she was the natural guardian of the minors. He, therefore, passed an order appointing her guardian of the person and property of the three minors.

The opponent appealed.

V. M. Mone, for the appellant (opponent):—The Judge has not considered all the circumstances which he should have done under section 17 of the Guardians and Wards Act before making the appointment. The appointment need not be based exclusively on the consideration of nearness of relationship. The Court should have regard to the interest of the minors and also to the fitness of the applicant. Proximity of relationship does not give an absolute right to the certificate, *Musst. Bhikuo Koer v. Musst. Chamela Koer*⁽¹⁾, *Sohna v. Khalak Singh*⁽²⁾. The minors being

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(1) (1897) 2 C. W. N. 191.

(2) (1889) 13 All. 78.

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old enough to exercise an intelligent preference, their wishes ought to have been consulted. The relationship here is also by half blood. The applicant may be appointed guardian with respect to minor 3 only.

V. V. Ranade, for the respondent (applicant) :—The Judge found that the property was joint and he took into consideration the circumstance that the applicant was the eldest member of the joint family. He, therefore, rightly gave preference to the applicant. *

[JENKINS, C. J.:—The family being joint has the Court any power to appoint guardian of the property? See *Virupakshappa v. Nilgangava*⁽¹⁾, *Gharib-ul-lah v. Khalak Singh*⁽²⁾, *Lingangowda v. Gangabai*⁽³⁾.]

We submit that those rulings are not applicable. In those cases the family consisted of adults and minors. In the present case all the persons entitled to the family property are minors. This circumstance gives rise to the necessity of representation by a guardian.

Mone in reply :—Referred to section 41, clause 2 (c) of the Guardians and Wards Act.

JENKINS, C. J.:—This is an appeal from an order appointing the respondent the guardian of the person and property of three minors, who are the sole members of a joint Hindu family: and we must first see whether it is within the power of the Court to make the appointment.

The status of the minors places no difficulty in the way of appointing guardians of the person; but different considerations apply to the guardianship of the property.

It must now be taken as established that a guardian of the property cannot be appointed for a minor whose only proprietary interest is as co-parcener with adults in joint family property.

This incompetence rests on the view that the interest of such a co-parcener "is not individual property at all, and therefore

(1) (1894) 19 Bom. 309.

(2) (1903) 30 L.

(3) (1896) P. J., p. 521.

a guardian, if appointed, would have nothing to do with the family property." *Gharibul-lah v. Khalak Singh*⁽¹⁾.

A distinction, however, has been drawn by a decision of this Court, whereby it was determined that the principle does not apply where all the co-parceners are minors and a guardian of the property is appointed for the whole number : *Lingangowda v. Gangubai*⁽²⁾. The same view is taken in *Trevelyan on Minors*, page 104, but the author cites no authority. The decision binds us.

The learned Judges by whom it was given were not unconscious of the difficulty that would arise when one of the minors attained majority, and the matter came before them at that stage in *Basalingappa v. Nazir* ⁽³⁾, but the case, in the course it took, furnishes us with no guidance of any value as to how this difficulty should be surmounted.

The solution appears to us to lie—assuming, as we must, that the appointment can be made—in section 39 of the Guardian and Wards Act which provides that the Court may remove a guardian by reason of the guardianship of the guardian ceasing, or being liable to cease under the law to which the minor is subject. The reason of the rule that when the joint family originally comprises an adult, a guardian of the property cannot be appointed, (in our opinion) involves the conclusion that as soon as there is an adult co-parcener any guardianship of the property previously constituted either ceases or is liable to cease, for then there is no longer any property in respect of which there can be a guardian.

Therefore, as it seems to us, an order appointing a guardian of the property of minor co-parceners, who exclusively constitute the joint family, should reserve liberty to any minor on attaining majority to apply for the removal of the guardian of the property or restrictions of his powers under section 52.

We hold on the strength of the cited authority that it was within the power of the Court to make the appointment under appeal.

(1) (1903) L. R. 30 I. A. 165 at p. 170. (2) (1896) P. J. p. 521.

(3) (1899) 1 Bom. L. R. 822.

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On the merits, however, we see no reason for appointing the respondent guardian of the person of the minors Govind and Gopal: we think the appellant should be so appointed, and the order appointing the respondent guardian of the person should be varied accordingly. There should also be reserved liberty to any of the wards on attaining majority to apply for the removal of the guardian of the property, or otherwise as he may be advised.

Order varied.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Batty.

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August 30.

KESHAVRAM DULAVRAM (ORIGINAL PLAINTIFF), APPELLANT, v. RANCHHOD FAKIRA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Mortgage—Two mortgages on the same property executed by the same person—
Suit under the second mortgage for sale of the property subject to the first
mortgage—Civil Procedure Code (Act XIV of 1882), section 43.*

Where a mortgagee holds two mortgages on the same property executed by the same person, he cannot maintain a suit to recover the sum due on the later mortgage only, by sale of the property subject to the prior mortgage.

SECOND appeal from the decision of J. C. Gloster, District Judge of Broach, varying the decree passed by P. J. Talyarkhan, Subordinate Judge of Ankleshwar.

On the 29th September 1895, Mithia mortgaged his house to the plaintiff for Rs. 599. The mortgage was without possession. Vanmali (a brother of Mithia) joined in this mortgage apparently as a surety.

On the 13th June 1898 Mithia alone (Vanmali having died in the meanwhile) executed a second mortgage in favour of the plaintiff in respect of the same house for Rs. 399. The material portions of the deed are set out in the judgment of Russell, J.

Under the second bond the plaintiff received Rs. 130, and to recover the balance Rs. 269, the plaintiff filed on the 27th

*Second appeal No. 214 of 1905.

October 1903, a suit against the heirs of Mithia, praying that the amount may be realized by sale of the mortgaged property subject to the prior mortgage of Rs. 599.

The defendants contended *inter alia* that the plaintiff was not entitled to bring the house to sale subject to the prior mortgage.

The Subordinate Judge upheld the defendants' contention and dismissed the plaintiff's suit.

The District Judge on appeal varied this decree "by directing that plaintiff do recover from the separate estate of Mithia in the hands of defendants, if any, the sum claimed."

The plaintiff then appealed to the High Court.

G. K. Parekh, for the appellant:—There is nothing in law to prohibit a mortgagee from bringing a suit on any one of the mortgages reserving his rights under the other mortgage. There is no provision in the Transfer of Property Act (IV of 1882) in restriction of this right of the mortgagee.

The cases of *Sundar Singh v. Bholu*⁽¹⁾ and *Kanti Ram v. Kutubuddin Mahomed*⁽²⁾ establish that when the same property is mortgaged to two different persons the puisne mortgagee can bring it to sale subject to the prior mortgage. If this is good law, then it makes no difference if the two mortgages are passed to one and the same persons. The case of *Dorasami v. Venkateshaya*⁽³⁾ is not quite to the point.

What was mortgaged in 1898 was but the equity of redemption and not an unascertained balance. Such mortgage deeds are very common in this part of the country.

The objection as to non-joinder of parties under section 85 of the Transfer of Property Act (IV of 1882) is only technical, as the parties under both the mortgages being the same, all the necessary parties under the first mortgage were as a matter of fact before the Court in the suit brought upon the second mortgage.

The Court erred in not ordering the sale of the property free of all charges under the first mortgage.

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(1) (1898) 20 All. 322.

(2) (1894) 22 Cal. 33.

(3) (1901) 25 Mad. 108.

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[At this point the Court allowed to the appellant's pleader an option to amend his claim; but he contended that it was not necessary to do so.]

M. N. Mehta, for the respondents:—We contend that the suit as brought is unmaintainable. This contention is based upon the following considerations.

Under the terms of the mortgage deed (Exhibit 28) the mortgagee cannot sue on the second mortgage unless his rights under the first mortgage are determined and the surplus or balance ascertained.

The suit is bad under section 85 of the Transfer of Property Act (IV of 1882) which provides that all parties should be on the record. The plaintiff has brought this suit on the second mortgage, so he is not on record *qua* mortgagee under the first mortgage. See *Derasami v. Venkataseshayyar*⁽¹⁾.

If the property be sold subject to the first charge it would fetch no price and the defendants would be materially prejudiced.

It is again a recognized principle of law that when two mortgages are executed in favour of the same person relating to the same property the mortgagor must redeem both the mortgages. This principle tends to prevent multiplicity of suits and should be recognized here. See *Mata Din Kasodhan v. Kazim Husain*⁽²⁾.

Lastly, the plaintiff cannot get the decree according to the relief prayed for as it would contravene the provisions of section 99 of the Transfer of Property Act (IV of 1882). See also *Bapu Ravji v. Ramji Svarupji*⁽³⁾.

The following cases also were referred to:—*Sri Gopal v. Pirthi Singh*⁽⁴⁾; *Govind Hari v. Parashram*⁽⁵⁾; and *Balmakund v. Sangari*⁽⁶⁾.

RUSSELL, J.—The two points in the suit are:—

(1) Whether, having regard to the plaint as framed and the terms of the mortgage-deed sued on, the plaintiff is entitled to maintain this suit.

(1) (1901) 25 Mad. 108.

(2) (1891) 13 All. 483, at pp. 465, 530.

(3) (1886) 11 Bom. 112.

(4) (1897) 20 All. 110, on appeal to P. C.

(1902) 24 All. 429.

(5) (1900) 25 Bom. 161.

(6) (1897) 19 All. 379.

(2) Can a holder of two mortgages on the same property maintain a suit on the latter one only for sale of the property subject to the prior mortgage?

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It is necessary to set out the facts shortly as follows :—

There were three brothers, Mithia, Fakira and Vanmali, who owned two ancestral houses. Vanmali separated from his brothers many years ago, and was allotted one of the said two houses as his share. The other house is the house in question herein.

Fakira, who was the father of the defendant herein, died in 1894, and in 1895, 29th September, Mithia and Vanmali executed a mortgage for Rs. 599 to the plaintiff of the house in question. Vanmali apparently joined in this mortgage as a surety only. Vanmali died in 1898 and shortly afterwards, *viz.*, on the 13th June 1898, the bond now in suit (Exhibit 28) was passed by Mithia alone to the plaintiff. The material portions of which are as follows :—

• After reciting how the Rs. 399 (the amount of the debt for which the mortgage was given) are made up, the mortgagor agrees to pay that sum by the instalments therein mentioned. Then it goes on “In consideration whereof I write over to you any surplus that may remain after deducting the principal amount with interest due on the hypothecation bond passed in respect of the under-mentioned property by me and my brother Vanmali on the 29th September 1895 for Rs. 599.” After describing the house in detail it goes on—

“The surplus in the above property is hypothecated, that can only be redeemed after the principal with interest is recovered. I agree to pay the same on demand after the expiration of the fixed date. If I fail to pay, you are at liberty to recover from the surplus and from me personally and from my other property. If per chance there be no surplus left in the property, you are at liberty to recover from me personally and from my other property.”

In his plaint the plaintiff says that “there was an amount due to him by Mithia and Vanmali and accounts were made up on the 13th June 1898 when Mithia passed a bond above referred to for Rs. 399 whereby he gave me in writing a san

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mortgage of the excess (*sic*) that may be left of the property after satisfaction. The san mortgage passed to me by Mithia and Vanmali for Rs. 599 on the 29th September 1895."

The plaint goes on : —

"Mithia who passed the bond is dead. Defendant and his nephews are his heirs. Please pass a decree for my recovering 269 Rupees" (it appears 130 Rupees had been recovered) "and the costs of the suit by the sale of the above-mentioned property after reserving the charge in respect of the amount due on the aforesaid san document on the 29th September 1895."

Both the lower Courts held that Mithia was not competent to charge the whole of the property and on this point there has been no appeal to this Court.

(1) As to the first point: Looking at the portion of the mortgage-deed and the plaint above set out, it appears clear, that what was mortgaged was the excess or surplus of the property which might be left after "satisfaction of his first mortgage" (as in the plaint stated), or "the surplus that might remain after deducting the principal amount with interest due after first mortgage" (as in the mortgage-bond stated). It is not necessary to decide whether such surplus or excess was such "a possibility coupled with an interest" as comes within the meaning of "*property*" in the Transfer of Property Act, section 3: for we are of opinion that until the amount due on the first mortgage is ascertained it is impossible to say what passed under the second mortgage, and consequently it is impossible to pass a decree for the plaintiff in this suit for any specific sum. The case is exactly analogous to the well known case of *Scott v Avery*⁽¹⁾ where the insurer was to be entitled to sue only for such sum as the arbitrator should award: and the decision of the arbitrator was held to be a condition precedent to the maintaining of the action. Here the ascertainment of the sum due on the first mortgage is a condition precedent to any obligation or liability arising on the second mortgage—nay more—if there should be no surplus on the first mortgage the liability of the mortgagor

(1) (1855) 5 H. L. C. 811.

is to be a personal liability only. See further *Spurrier v. La Oloche*⁽¹⁾.

2. As to the second point : Having regard to sections 32 and 43 of the Civil Procedure Code (which we read so far as material) it would certainly seem that the plaintiff herein should have sought relief in respect of his first mortgage as well as his second in this suit. For as is well put in Pomeroy on Remedies, section 330 "necessary parties defendants are those without whom no decree at all can be rendered : proper parties defendants are those whose presence renders the decree more effectual : and *all* the proper parties are those by whose presence the decree becomes a complete determination of all the questions which can arise, and of all the rights which are connected with the subject-matter of the controversy."

On this point, therefore, we are in agreement with the High Court of Madras in *Dorasami v. Venkateshacharyar*⁽²⁾ where they discuss the *dictum* of the Allahabad High Court in *Mata Din Kasodhan v. Kazim Husain*⁽³⁾, viz. "that there is nothing in the Civil Procedure Code or in the Transfer of Property Act, which prevents a holder of two independent mortgages over the same property, who is not restrained by any covenant, in either of them, from obtaining a decree for sale on each of them in a separate suit."

However this may be, it would appear from section 85 of the Transfer of Property Act that the plaintiff is not entitled to sue in the manner in which he has done herein. That section (which is under the heading "Suits for foreclosure, sale or redemption") is as follows "Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this Chapter relating to such mortgage : provided that the plaintiff has notice of such interest."

As Banerji J., in *Balmakund v. Musammat Sangari*⁽⁴⁾, says "as a prior mortgagee is a person who has an interest in the mortgaged property, he is a necessary party to the suit for sale brought by a puisne mortgagee, provided that the latter has notice of the

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(1) [1902] A. C. 446.

(3) (1891) 13 All. 432.

(2) (1901) 25 Mad. 108 at p. 116.

(4) (1897) 19 All. 379 at p. 384.

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prior mortgage. The omission to join such a prior mortgagee in the subsequent mortgagee's suit entails, according to the ruling of the Full Bench in *Matadin's case*⁽¹⁾, the dismissal of the suit."

The abuses which section 85 of the Transfer of Property Act was directed at will be found set out in *Sri Gopal v. Pirthi Singh*⁽²⁾ which was confirmed by the Privy Council⁽³⁾.

In the present case, no doubt the plaintiff is already a party to this suit. But looking at the wording and object of section 32 of the Civil Procedure Code the correct reading of it would seem to be that "all parties having an interest, etc., must be joined *in respect of such interest* as parties, etc."

There are numerous cases which support the view we take. We need only refer to some of them. In England, in *Palmer v. The Earl of Carlisle*⁽⁴⁾ it was held that a person entitled to part only of a sum of money due on mortgage could not file a bill for a foreclosure of the same part of the mortgaged estate. Here the plaintiff is really in the present suit filing his plaint in respect of a part only of the monies due to him in respect of the property in question.

In India (*Dorasami v. Venkataseshayyar*⁽⁵⁾), it was held that a mortgagee holding two mortgages on the same land could not sue on the earlier one for sale subject to the later one—a converse case to the present. The whole of the judgment in that case is pertinent to the present case. There the Court says at p. 115 "But a party suing upon one of his mortgages, can have no excuse for his not including in the suit his rights under his other mortgages, for he must necessarily have notice of the same."

Again it is difficult to see any answer to the argument derived from the form of a decree for sale in No. 128, schedule 4, to Civil Procedure Code at p. 115 of that judgment. Further, in *Mata Din Kasodhan v. Kazim Husain*⁽⁶⁾ the Allahabad High Court says "One thing is quite clear, that the plaintiffs cannot sell the property twice over, and they cannot sell under the second decree subject to the first."

(1) (1891) 13 All. 432.

(2) (1897) 20 All. 110 at p. 114.

(3) (1902) 29 I. A. 118; 24 All. 429.

(4) (1823) 1 S. & S. 423.

(5) (1901) 25 Mad. 108.

(6) (1891) 13 All. 432.

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Again, as pointed out by the Madras High Court, in *Dorasami v. Venkateshaggar*⁽¹⁾, the principle of section 61 of the Transfer of Property Act which prevents the mortgagor who has mortgaged the same property twice over to the same person from redeeming one mortgage without redeeming the other also applies equally to a mortgagee who, having several mortgages over the same property, seeks to obtain an order for sale on one mortgage only.

It will be observed that section 43 of the Civil Procedure Code is imperative. Suppose a decree was passed for the plaintiff herein and he afterwards sued on the first mortgage, it seems to us that that would be a "splitting of his claims" within the meaning of Sir Lawrence Jenkins' judgment in *Govind v. Parashram*⁽²⁾ which section 43 was intended to prevent. Regard however must be had to the query in *Sri Gopal v. Pirthi Singh*⁽³⁾.

In the present suit every opportunity was given both in the lower appellate Court and in this Court to the plaintiff to amend his claim. He, however, rejected all such offers and, in spite of the risks which this Court pointed out to his pleader he was running, he determined to go on. For the reasons we have given above he was wrong in so doing, and the only decree we now pass is to dismiss the suit in so far as it seeks for sale of the mortgaged property. The plaintiff will, however, be at liberty to recover from the separate estate of Mithia (if any) in the hands of the defendants the sum claimed. The plaintiff must bear all costs throughout provided nevertheless that if the estate of Mithia in the hands of the defendants is sufficient to pay the claim and costs, then the costs of this suit shall be borne by that estate. This amounts to a confirmation of the decree of the lower appellate Court which is accordingly confirmed.

R. R.

Decree confirmed.

(1) (1901) 25 Mad. 108 at p. 115. (2) (1900) 25 Bom. 161; 2 Bom. L. R. 864.

(3) (1902) 29 I. A. 118 at p. 126; 4 Bom. L. R. 827; 24 All. 429.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

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August 31.

GANPAT TATIA MAIMKAR (ORIGINAL APPLICANT), APPELLANT, v.
ANNA BIN ANANDRAO AND OTHERS (ORIGINAL OPPONENTS), RESPONDENTS.*

*Guardians and Wards Act (VIII of 1890), sections 34, 35, 36 and 37—
Minor—Guardian—Administration bond passed to Judge—Refusal of the
Judge to assign—Appeal.*

No appeal lies from an order passed by the District Judge under section 35 of the Guardians and Wards Act (VIII of 1890) declining to assign the bond.

A bond under section 34 of the Guardians and Wards Act (VIII of 1890) is to be given to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed engaging duly to account for what the guardian may receive in respect of the property of the ward. There is nothing in the section or in the form, as given in the schedule of the High Court Circular Orders, which suggests that the bond ceases to operate either on the death of the guardian or of the ward or on the cesser or otherwise of the guardianship, so that a right of suit would still continue notwithstanding the happening of these events.

The District Judge can in his discretion under such circumstances assign such a bond to a proper person.

APPEAL converted into an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of F. X. DeSouza, District Judge of Sholapur, rejecting an application for the assignment of a bond under section 35 of the Guardians and Wards Act (VIII of 1890).

One Apparav Anandrav, a certificated administrator of Bhagirathibai, a minor, passed a bond with two sureties, Baburav Dinkar and Laxuman Narasinh, to the District Judge of Sholapur under section 35 of the Guardians and Wards Act (VIII of 1890). The bond was dated the 4th September 1897 and provided *inter alia* for the rendering of proper accounts of the minor's estate from time to time and in default for a liability to pay a sum of Rs. 15,000. Subsequently Bhagirathibai died in December 1897 and Apparav, the certificated guardian, died in the beginning of January 1898. In the year 1902, one Ganpat Tatia Maimkar,

* Appeal No. 48 of 1905 converted into an application No. 231 of 1905 under extraordinary jurisdiction.

claiming himself to be the heir of the deceased Bhagirathibai, brought a suit in the Court of the First Class Subordinate Judge of Belgaum for an account of the estate of the deceased against the heir of the certificated guardian and the two sureties. While the suit was pending, Ganpat Tatia Maimkar applied to the District Judge of Sholapur for the assignment of the bond to him so that he may be in a position to continue the suit. The District Judge rejected the application on the following grounds:—

It appears from the record that Apparav rendered no accounts of the estate of his ward to the District Court as stipulated in the bond. But on a construction of sections 35, 36 and 37 of the Act, I am of opinion that the assignment contemplated by section 35 can only be made during the life-time of the ward and during his minority only. Under section 35, the assignee is entitled to recover on the bond "as trustee for the ward"; his heirs and representatives are not contemplated either expressly or by necessary implication. Under section 36, the appointment of next friend by the Court is provided for only "during the continuance of the minority of the ward." The inference is that the legislature has made provision for this exceptional machinery to safeguard the minor's interest only during the life-time and minority of the ward. This will be apparent from a consideration of the wording of section 37, which after referring to the remedies "expressly provided in sections 35 and 36" enacts a saving clause in favour of the general liabilities of the guardian or his representative, as trustee for the ward or his representative.

In this view of the law, I am of opinion that the present application should be dismissed with costs.

The applicant preferred an appeal.

G. S. Mulgaumkar for the appellant (applicant):—The Judge erred in construing sections 35, 36 and 37 of the Guardians and Wards Act. He has put a very narrow construction upon the sections and according to his view the provisions of the Act would become nugatory.

N. V. Gokhale for the respondents (opponents):—The Judge can assign the bond only during the life-time of the ward but after the ward's death he cannot do so. He can himself take action on the bond.

Further under section 47 of the Guardians and Wards Act the order of the Judge is not appealable.

[JENKINS, C. J.:—We can convert the appeal into an application under the extraordinary jurisdiction under section 622 of the Civil Procedure Code.]

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Mulgaumkar, in reply:—We pray that we may be allowed to convert the appeal into an application as the Judge has by his order denied jurisdiction vested in him under the said sections of the Act.

JENKINS, C. J.—This appeal arises out of an application made by the appellant to the District Judge to have a bond assigned in his name to enable him to continue a suit in the Court of the First Class Subordinate Judge of Sholapur.

The bond is not before us but it is stated by the District Judge that it was passed to the District Judge of Sholapur by Apparao and two sureties.

The application is made under section 35 of the Guardians and Wards Act.

The District Judge has declined to assign the bond, and it is clear that no appeal lies from that determination.

We have, however, allowed the appeal to be converted into an application under section 622 of the Civil Procedure Code, and we think that we can with propriety interfere with the order of the District Judge, because he appears to us to have based his refusal on the ground that it was not possible for him to make the assignment.

We do not agree with that view. A bond under section 34 is to be given to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed engaging duly to account for what the guardian may receive in respect of the property of the ward. The form of the bond is given in the schedule to the High Court Civil Circular Orders.

Now there is nothing in the section or in the form which suggests that the bond ceases to operate either on the death of the guardian or of the ward or on the cesser otherwise of the guardianship, so that a right of suit would still continue notwithstanding the happening of these events. Then who is to sue? Unless there is an assignment it must be the District Judge. It appears to us that it would be most undesirable for a District Judge to have to sue though events may compel him to do so, and, it is for this reason that the assignment by the District Judge to a proper person is provided for by the Act.

In our opinion the learned District Judge has placed too narrow a meaning on sections 35, 36 and 37 of the Act, when he spells out of them anything which prevents the District Judge assigning the bond after the happening of the events which have occurred in this case, and we at present think that the District Judge has power to assign the bond, though by so saying we do not intend to prejudge any defence that may be raised in any suit hereafter brought. As to whether he should or should not assign it is a matter for his consideration; all we can do now is to set aside the order passed, and remit the case in order that the District Judge may determine whether in the circumstances he should assign the bond.

No order as to costs.

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ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

MOTILAL PRATABCHAND, PLAINTIFF, v. SURAJMAL JOHARMAL
AND ANOTHER, DEFENDANTS.*

1904.

September 27.

*Letters Patent, clause 12—Contract Act (IX of 1872), sections 46-49, 94—
Commission agent—Place of payment of debt—Cause of action—Jurisdiction.*

The plaintiff, a commission agent and merchant carrying on business in Bombay, gave instructions to the defendants, also commission agents and merchants carrying on business at Phulgaon in the Birda Zilla, to enter into certain transactions on behalf of the plaintiff, and the defendants entered into those transactions as commission agents on behalf of the plaintiff. Accounts were sent and advices were transmitted from Phulgaon to the plaintiff in Bombay and from Bombay by the plaintiff to the defendants at Phulgaon. Subsequently the plaintiff having applied for leave under clause 12 of the Letters Patent brought a suit in the High Court at Bombay to recover the amount due from the defendants at the foot of the accounts between himself as principal and the defendants as commission agents at Phulgaon: the defendants pleaded want of jurisdiction.

Held that as (1) instructions were sent to the defendants from Bombay, (2) accounts were rendered to the plaintiff (at Bombay) and (3) demand was made from Bombay to the defendants at Phulgaon, the payment of money therefore was clearly to be in Bombay.

* Original Suit No. 492 of 1904.

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PER CURIAM:—The expression cause of action means the bundle of facts, which it is necessary for the plaintiff to prove before he can succeed in his suit. Not irrelevant, immaterial facts, but material facts without which the plaintiff must fail.....If any of these material facts have taken place within the jurisdiction of the Court, then leave can be given under clause 12 of the Letters Patent. But if no such material facts have taken place within the jurisdiction of the Court and leave is given, then it is open to the defendant to contend at the hearing that the Court has no jurisdiction.....Where no specific contract exists as to the place where the payment of the debt is to be made, it is clear, it is the duty of the debtor to make the payment where the creditor is.

THE plaintiff sued to recover from the defendants Rs. 3,860-4-6 together with interest at 6 per cent. from the 1st June, 1904, till payment, together with costs and further and other relief; alleging that he carried on business at Bombay as merchant in cotton and other articles, that the defendants were also merchants and commission agents carrying on business in cotton at Phulgaon in the Birda Zilla, that during the year 1903-1904 the plaintiff employed the defendants and the defendants agreed to act as *del credere* agents of the plaintiff for the purchase and sale of cotton on plaintiff's behalf at Phulgaon, that under the instructions and orders of the plaintiff sent from Bombay, the defendants as such agents entered into a number of transactions for the purchase and sale of cotton at Phulgaon on plaintiff's behalf, and on account of those transactions the defendants had become liable to account and to pay to the plaintiff in Bombay the aforesaid sum as per statement of account annexed to the plaint, that the plaintiff called upon the defendants to pay to him the said amount but they put off payment under various pretexts and that though the defendants resided at Phulgaon in the Birda Zilla, as the money was payable at Bombay, a part of the cause of action arose at Bombay and the High Court at Bombay had jurisdiction to try the suit on leave to sue being granted under clause 12 of the Letters Patent.

The defendants answered that the Court had no jurisdiction to entertain the suit inasmuch as the cause of action arose at Phulgaon where the defendants resided and carried on business and where the transactions in suit took place and that the suit was premature as the rates of the produce for the due date were to be settled by the Panch at Phulgaon and they were still unsettled.

V. S. Bhandarkar, for the plaintiff.

F. S. Talyarkhan, for the defendants.

TYABJI, J. :—In this suit the plaintiff prays that the defendant may be ordered to pay to the plaintiff the sum of Rs. 3,860-4-6 with interest at 6 per cent. per annum from 1st June, 1904, till payment and prays for costs : and further and other relief.

The case is shortly this.

The plaintiff is a commission agent and merchant carrying on business in Bombay and the defendant is commission agent and merchant carrying on business at Phulgaon in the Birda Zilla. In the years 1903 and 1904 certain instructions were given by the plaintiff to the defendant at Phulgaon to enter into certain transactions on behalf of the plaintiff, and the defendant entered into those transactions as commission agent on behalf of the plaintiff. The terms were on the footing of *pakki adat* : a sort of *del credere* agency. Accounts were sent and advices were transmitted from Phulgaon to the plaintiff in Bombay and from Bombay by the plaintiff to the defendant at Phulgaon. The previous transactions were such that the plaintiff had acted as agent of the defendant and the accounts were settled, it appears, at Phulgaon, and money paid there.

The plaintiff now says that at the foot of the accounts between himself as principal and defendant as commission agent at Phulgaon, there is this amount to which I have above referred to still due and he claims to recover it.

The defendant has put forward two defences. The first is want of jurisdiction in this Court, and the second is, that it was a condition precedent between the parties that before the plaintiff could recover anything from the defendant, the rates of the produce for the due date should be settled by the Panch at Phulgaon. The defendant alleges that the rates have not yet been fixed by the Panch at Phulgaon, and accordingly this suit is premature and must be dismissed.

Now as to the question of jurisdiction of this Court, this suit has been admitted in this Court and leave granted under clause 12, Letters Patent, on the supposition that a material part of the cause of action had occurred within its jurisdiction. The defendant alleges that no material part of the cause of action has occurred within the jurisdiction of this Court. The expression

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cause of action means the bundle of facts, which it is necessary for the plaintiff to prove before he can succeed in his suit. Not irrelevant, immaterial facts, but material facts without which the plaintiff must fail. The authorities show that if any of these material facts have taken place within the jurisdiction of the Court, then leave can be given under clause 12 of the Letters Patent. But if no such material facts have taken place within the jurisdiction of the Court and leave is given, then it is open to the defendant to contend at the hearing that the Court has no jurisdiction. The question, therefore, before me is, whether a material part of the cause of action has occurred within the jurisdiction of this Court? In order to ascertain that point, I must first inquire, what is it that the plaintiff must prove before he can succeed and then inquire whether any of the material facts which he must prove have occurred within the jurisdiction of the Court. What then has the plaintiff to establish? He has to establish, that he gave certain instructions to the defendant as his commission agent. He has to establish that these instructions duly reached the defendant as his commission agent, and that the defendant executed the commission with which he was charged. That the defendant was bound to render an account to the plaintiff: and that if there was any balance due by the defendant to the plaintiff, the defendant was bound to send it to the plaintiff. And if there was anything due by the plaintiff to the defendant, then the plaintiff was bound to send it to the defendant. He would have further to prove that in this case although there was a balance due by the defendant to the plaintiff, and although demand was made, yet defendant failed to render him an account or pay the amount due at the foot of the account. These are facts which must be established before he can succeed in this suit.

Now looking to the facts of this case, I find, first, that instructions were sent out from Bombay, and secondly, accounts had to be rendered to the plaintiff—plaintiff was in Bombay—therefore accounts had to be sent to Bombay: and thirdly, payment was to be made to the plaintiff, and that payment, unless the plaintiff went to Phulgaon, would necessarily be made in Bombay or remitted by means of *kundis* from Phulgaon to Bombay. Demand was made from Bombay to the defendant at Phulgaon. The

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payment of the money therefore was clearly to be in Bombay, because the ordinary principle and maxim of law is, that where no specific contract exists as to the place where the payment of the debt is to be made, it is clear that it is the duty of the debtor to make the payment where the creditor is.

Here the correspondence between the parties clearly leads me to the conclusion that the payment was to be made in Bombay and that the defendant in his letters promised to send *hundis* to the plaintiff in Bombay and to render accounts to the plaintiff in Bombay. Therefore the express contract so far as it can be gathered from these letters tends to show that the payment was to be in Bombay.

[His Lordship after reading the letters that passed between the parties, said :]

From these letters it is quite clear, that both the parties understood, that the accounts were to be rendered to the plaintiff where he was, *viz.*, Bombay.

Apart from these letters I think the law is clear, that the payment would have to be made by the defendant to the plaintiff in Bombay. In *Robey v. Snaefell Mining Company*⁽¹⁾, the head note runs as follows :—

“In an application for service out of the jurisdiction it appeared that the action was brought by the plaintiffs, engine makers in England, for the price of machinery erected by them in the Isle of Man for the defendants, a company carrying on business in the Island. There was no agreement as to the place of payment. *Held*, that it must be taken to be part of the contract that the plaintiffs should receive payment in England, that the action was therefore founded on a breach within the jurisdiction, according to order XI, R. 1 (e), and that service out of the jurisdiction might be allowed.”

At page 153 Stephen, J., observed :—

“The first question is whether the Court has jurisdiction to grant leave to serve the writ in the Isle of Man ; that depends on the mode in which the contract was to be executed. The plaintiffs were to deliver the machinery in the Isle of Man, and the defendants were to pay for it upon delivery, and upon the receipt of a certificate from their engineer that the machine was in good working order. There was no definite agreement as to where the money was to be paid. We think that so far as regards the question of jurisdiction the contract was to be executed within the jurisdiction, and that the debtors having to pay for the goods it was their duty to send or bring the money to the

(1) (1878) 20 Q. B. D. 152.

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creditors. Some authority for that is to be found in Coke upon Littleton to the effect that the obligor of a bond must go to the obligee in order to pay it. This in practice would impose little inconvenience on the defendant, and therefore there is not likely to be much authority on the subject at the present day. The question can only become material in some such case as this. The ordinary course of business would be for the defendants to send a cheque to the plaintiffs at Lincoln, and payment would no doubt take place there when the cheque was received at Lincoln, or was cashed, or at any rate accepted in payment. Suppose that, according to a primitive mode of dealing the defendants had to pay in coin, they would have to carry it to Lincoln, and the plaintiffs would not be under the necessity of going over to the Isle of Man to get it. Light is thrown on order XI, R. 1 (c), enabling the Court to allow service of a writ out of the jurisdiction when the action is founded on a breach within the jurisdiction of a contract 'which ought to be performed within the jurisdiction'—by the exception, 'unless the defendant is domiciled or ordinarily resident in Scotland or Ireland.' But there is no such exception as to defendants in the Isle of Man. The Scotch and Irish having their own Courts secured practically the privilege of being sued in Scotland or Ireland respectively, the Manxmen did not. We think therefore there is jurisdiction to allow service of the writ. The second question is whether in the exercise of our discretion we should allow it to be served in the Isle of Man. The plaintiff must of course go to a Court with jurisdiction over his case, but subject to that he may choose his forum. He has chosen to sue in the High Court. It is said that there is a cheaper Court in the Isle of Man. There may be, and I have no reason to doubt that the Courts there are perfectly competent, but the plaintiff may choose, and he prefers the English Court. As to the balance of convenience, one or other of the parties with the respective witnesses must cross the sea, and I do not think it unreasonable to say that the party who chooses the Court should, if he likes, spare himself, his witnesses and advocates, the possibility of a disagreeable voyage."

In *Bell & Co. v. Antwerp, London and Brazil Line* and *Reynolds v. Coleman*⁽²⁾ and *Pragdas v. Dowlatram*⁽³⁾ the question of jurisdiction is fully discussed. I do not think it necessary to refer to them in detail.

The sections of the Contract Act bearing on this point are 46, 47, 48, 49 and 94, which I have duly considered.

I come to the conclusion, therefore, that part of the cause of action which necessitated the defendant's rendering the accounts to the plaintiff and his sending money to the plaintiff are material parts of the cause of action and occurred within the

(1) [1891] 1 Q. B. 103 at p. 107.

(2) (1887) 36 Ch. D. 453 at p. 464.

(3) (1886) 11 Pom. 257.

jurisdiction of this Court. Therefore the Judge in Chambers was justified in giving leave to file this suit in this Court.

Then the next point to consider is, whether it was a condition precedent that the Panch at Phulgaon should settle the question of rates before payment can be demanded by the plaintiff. No evidence has been produced except that of the defendant himself. Against that I have the evidence of Pardhan Ramdhan and Devikissen Jethmal and of the plaintiff's *moonim* Keshrichand. They all deny such a custom. It is curious that this alleged custom did not prevent the defendant himself from suing his own constituents at Phulgaon in spite of the rate not having been fixed by the Panch. I hold that the alleged custom is not proved.

The result is that there must be a decree for the plaintiff.

I pass a decree for Rs. 3,860-4-6 with interest at 6 per cent. per annum from the 21st July, 1904, the date on which the plaint was admitted till this day. Further interest at 6 per cent. per annum till payment, with costs.

Suit decreed.

Attorneys for the plaintiff: *Messrs. Mulla and Mulla.*

Attorneys for the defendants: *Messrs. Tyalji and Company.*

G. E. R.

ORIGINAL CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batty.*

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(ORIGINAL PLAINTIFFS), APPELLANTS, *v.* LAKSHMISHANKER DEO-
SHANKER AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Practice—Ex parte order—False representation—Suit for relief inconsistent with order—Set off claimed in Written Statement—Omission to frame issue—Civil Procedure Code (Act XIV of 1882), sections 111, 146, 561, 566—Company—Liquidation—Indian Companies Act (VI of 1882), sections 149, 214—Meaning of “legally recoverable.”

The Ahmedabad Advance Spinning and Weaving Company, Limited (the plaintiff Company), was registered as a Limited Company on April 19, 1895.

* Suit No. 607 of 1900; Appeal No. 1293.

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By the Articles of Association, T. Ralph Douse and the firm of Lakshmishanker Deoshanker & Co. (the members of which were Lakshmishanker and Miranda, the defendants in this suit) were appointed Secretaries, Treasurers and Agents of the Company.

On the 12th May, 1898, a mortgage was executed by the plaintiff Company, in favour of the defendant Miranda, to secure Rs. 1,50,000, alleged to have been borrowed from him from time to time, to meet the wants of the Company, and debentures for Rs. 1,50,000 were issued.

The Rs. 1,50,000, alleged to have been borrowed from Miranda, was made up of 8 items, the first 3 of which aggregated Rs. 48,458-14-0, and the remaining 5, Rs. 1,01,541-2-0.

On the 13th August, 1898, the accounts of the plaintiff Company, which had been kept by the defendant Lakshmishanker, showed a balance to the Company's credit of Rs. 1,26,659-2-2.

On that date, T. Ralph Douse became the sole Secretary, Treasurer and Agent of the plaintiff Company, and thenceforth the balance of Rs. 1,26,659-2-2 was not shown in the Company's books.

On the 31st August, 1898, a mortgage was executed by the plaintiff Company in favour of Mr. Tata to secure Rs. 3,50,000, and a memorandum on the document stated, that after paying off certain prior mortgagees amounting to Rs. 1,03,223-5-4 and the debenture trustees (Rs. 1,50,000) the balance of Rs. 96,776-10-8 was paid to the Company.

On the 13th October, 1899, the plaintiff Company was wound up, under an order of the Court.

On the 21st November, 1899, the Court passed an order *ex parte* against Douse, directing him, within 4 days, to pay to the Official Receiver, Rs. 1,26,659-2-2, being the balance to the credit of the Company, appearing to be in cash in his hands, and to which the Company was *prima facie* entitled. The hypothesis on which this order proceeded being that this amount was an existing asset improperly taken by Douse from the plaintiff Company's coffer.

On a summons being taken out by Douse for revocation of the order, it was confirmed with costs.

On the 28th August, 1900, the plaintiff Company, with the leave of the Court, filed a suit against the defendants, for the recovery of Rs. 1,01,541-2-0. The suit, in contradiction of the grounds on which the order in winding up proceedings was made, was based on the allegation, that the 5 items aggregating Rs. 1,01,541-2-0, or parts thereof, were fraudulently and fictitiously credited to the defendant Miranda and that the same were not paid to the plaintiff Company.

The defendants contended, that the suit was barred by the proceedings and order against Douse, and the defendant Lakshmishanker in his written statement asserted a claim to set off Rs. 57,930. No issue, however, on the claim of Lakshmishanker was raised; no pronouncement on it was made by the 1st Court; it was not made the subject of any cross-objection; and it was not urged before the Appeal Court in argument.

In the lower Court, the plaintiff's suit was dismissed with costs. On appeal,

Held, that the decree of the lower Court with reference to the defendant Miranda must be confirmed with costs. The plaintiff Company was, however, entitled to be paid the sum of Rs. 41,891-2-0 by the defendant Lakshmishanker. The proceedings of the Official Liquidator were based on a representation by Lakshmishanker that certain sums had been advanced to the Company, partly by Miranda and partly by Lakshmishanker. The sums amounting to Rs. 41,891-2-0, alleged to have been advanced by Lakshmishanker, were not paid to the Company and Lakshmishanker could not be heard to say that the plaintiff Company was barred from bringing the present suit.

Moran v. Payne⁽¹⁾ followed.

Per JENKINS, C. J.:—In the conditions which prevail here, the practice of passing *ex parte* orders, involving the person affected in serious liability, is much to be deprecated.

Held, also, that it was essential to the right decision of the suit, that appropriate issues should be framed and tried with a view to determining the validity of Lakshmishanker's claim to set off the Rs. 57,920.

On issues having been framed and sent down for trial, the lower Court found that Lakshmishanker had lent the moneys referred to in his written statement and held that he was entitled to set off the same as against the sum of Rs. 41,891-2-0 for which the Appellate Court had held him liable. The plaintiff appealed.

Held, that section 111 of the Civil Procedure Code applied and that the amount due to Lakshmishanker must be set off against the plaintiff Company's demand.

Ince Hall Rolling Mills Company v. Douglas Forge Company⁽²⁾ and *Ex parte Pelly*⁽³⁾ distinguished.

Per JENKINS, C. J.:—In my opinion the words "legally recoverable" in section 111 of the Civil Procedure Code, 1882, have no reference to the ability of the debtor to pay the demand in full; and a sum is legally recoverable though in the result the creditor must be satisfied with a dividend.

APPEAL from Tyabji, J.

On the 19th April, 1895, the Ahmedabad Advance Spinning and Weaving Company, Limited (the plaintiff Company), was registered as a Limited Company under the Indian Companies Act, 1882.

By the memorandum of Association, it was agreed, that T. Ralph Douse and the firm of Lakshmishanker Deoshanker & Co. (the members of which were Lakshmishanker and Miranda, the defendants in this suit) should be the Secretaries,

(1) (1873) L. R., 8 Ch. 881 at p. 887.

(2) (1882) 8 Q. B. D. 179.

(3) (1882) 21 Ch. D. 492.

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Treasurers and Agents of the Company, and by clause 56 of the Articles of Association they were so appointed.

By an agreement, dated the 19th April, 1895, between T. Ralph Douse and the Company, Douse agreed to supply the plaintiff Company with weaving machinery and extras for the sum of £33,000, payable one-half in cash and one-half in fully paid up shares of the plaintiff Company of Rs. 3,00,000.

The shares were allotted and the cash payments were made, though not at the dates stipulated.

On the 1st July, 1897, a mortgage was executed by the plaintiff Company in favour of Govindji Thackersey Mulji and Virchand Dipchand to secure an advance of Rs. 50,000.

On the 12th May, 1898, a mortgage was executed by the plaintiff Company in favour of the defendant Miranda, to secure Rs. 1,50,000, alleged to have been borrowed from him from time to time, to meet the wants of the plaintiff Company, and debentures for Rs. 1,50,000 were issued.

The Rs. 1,50,000 alleged to have been borrowed from Miranda was made up of 8 items, the first three of which aggregated Rs. 48,458-14-0, and the remaining 5, Rs. 1,01,541-2-0.

On the 20th June, 1898, a mortgage was executed by the plaintiff Company in favour of Shankerlal Jethabhai, to secure an advance of Rs. 50,000.

On the 13th August, 1898, the accounts of the plaintiff Company, which had been kept and signed from time to time by the defendant Lakshmishanker, showed a balance to the Company's credit of Rs. 1,26,659-2-2.

On the 13th August, 1898, T. Ralph Douse became the sole Secretary, Treasurer and Agent of the plaintiff Company, and from that date the balance of Rs. 1,26,659-2-2 was not shown in the Company's books.

On the 31st August, 1898, a mortgage was executed by the plaintiff Company in favour of Mr. Tata, to secure an advance of Rs. 3,50,000. A memorandum on the document stated that Rs. 3,50,000 were paid as follows:—

				Rs.		p.	
To Govindji Thackersey Mulji and Virchand Dipchand,							
Debenture Trustees	...	...	...	52,223	5	4	
S. C. Miranda, Debenture Trustee	...	...	...	1,50,000	0	0	
Shankerlal	...	...	...	50,000	0	0	
The Company	...	...	...	96,776	10	8	

On the 13th October, 1899, the plaintiff Company was wound up under an order of the Court and Mr. C. A. Turner was appointed Official Liquidator.

On the 21st November, 1899, Mr. Justice Russell passed an order *ex parte* against Douse, directing him within 4 days to pay to the Official Receiver "the sum of Rs. 1,26,659-2-2, being the balance to the credit of the above Company appearing to be in cash in the hands of the said T. Ralph Douse and to which the said Company is *prima facie* entitled."

On a summons being taken out by Douse for the revocation of the order, it was confirmed with costs.

On the 2nd May, 1900, Mr. N. C. Macleod was appointed Official Liquidator in Mr. Turner's place.

On the 28th August, 1900, the plaintiff Company, with the leave of the Court, filed a suit against the defendants, for the recovery of Rs. 1,01,541-2-0. The suit, in contradiction of the grounds on which the order in winding up proceedings was made, was based on the allegation, that the 5 items aggregating Rs. 1,01,541-2-0, or parts thereof, were fraudulently and fictitiously credited to the defendant Miranda, and that the same were not paid to the plaintiff Company.

The defendants contended, that the suit was barred by the proceedings and order against Douse, and the defendant Lakshmi-shanker, in his written statement, asserted a claim to set off Rs. 57,930.

By an oral judgment, passed on the 8th August, 1903, Tyabji, J., dismissed the plaintiff's suit with costs. The learned Judge held, that the plaintiff's case was devoid of foundation; that the suit was a malicious and vexatious suit; that out of the enormous quantity of documents put in in evidence on the part of the plaintiffs, not one of them had any bearing upon the case brought by the plaintiffs; that there was not the shadow of a shred of evidence of any fraud such as was alleged in the plaint; that everyone of the documents put in in evidence by the plaintiffs showed conclusively, that the transactions, so far from being fraudulent, were transactions which were perfectly genuine and *bona fide*; that the evidence given by the defendants was truthful and that he had no hesitation in holding that the

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moneys were paid by the defendants as alleged by them, and, finally, that the defendants had proved to his entire satisfaction, that they had paid various sums of money, which the plaintiffs charged as fictitious.

No issue was raised in the lower Court, with reference to the claim of Lakshmishanker to set off Rs. 57,930; no pronouncement upon it was made in the judgment; it was not made the subject of any cross-objection, and it was not urged before the Appeal Court in argument.

Scott (Advocate General) and *Padshah* for the appellants (plaintiffs).

L. M. Wadia and *Kanga* for respondent 1 (defendant 1).

Davar and *Jardine* for respondent 2 (defendant 2).

The judgment of the Court was delivered by

JENKINS, C. J.:—The Ahmedabad Advance Spinning and Weaving Company, Limited (to whom I will hereafter refer as the plaintiff Company), was registered on the 10th April, 1895, as a Limited Company under the Indian Companies Act, 1882, having been promoted by T. Ralph Douse and the defendants.

Its capital was Rs. 7,00,000 divided into 700 shares of Rs. 1,000 each: and by the memorandum of Association it was provided that T. Ralph Douse and the firm of Lakshmishanker Deoshanker & Co., the members of which were the defendants in this suit, were to be the Secretaries, Treasurers and Agents of the plaintiff Company, and by the 56th of the Articles of Association the defendants and Douse were so appointed.

On the 19th April, 1895, an agreement in writing was made between Douse, of the one part, and the plaintiff Company, of the other part, whereby Douse agreed with the plaintiff Company that in consideration of the sum of £33,000 sterling, he would supply the plaintiff Company with spinning and weaving machinery, together with engine, boiler, girders and extras as therein specified, and he agreed to accept payment of the purchase price as to one-half in cash, and as to the other half in fully paid up shares of the plaintiff Company of Rs. 3,00,000.

The cash portion of the consideration was payable as follows:—

1/3 by three payments of £1,000 at the current rate of exchange on the day when the contract is signed, £5,000 at the

current rate of exchange of the day on the 15th June, 1895, and £5,000 at the current rate of exchange of the day on the 1st September, 1895.

The balance of the cash was to be paid by the plaintiff Company upon arrival of each further shipment of machinery in Bombay harbour, "each separate payment to be *pro rata* to the contract price, together with freight, insurance and actual cost of shipping charges."

The 300 shares were allotted to Douse in accordance with the contract and the amount of the 3 instalments has also been paid though not at the dates stipulated. Payments have also been made in respect of the balance which was payable *pro rata*.

In addition to the 300 shares allotted to Douse, he subscribed and paid for 41 shares.

The 1st and 2nd defendants subscribed and paid for 67 and 51 shares respectively and 117 shares were allotted to other persons.

On the 1st July, 1897, the plaintiff Company executed in favour of Govindji Thackersey Mulji and Virchand Dipchand a mortgage on its property to secure an advance of Rs. 50,000.

On the 12th May, 1898, the plaintiff Company executed in favour of the defendant Miranda a mortgage of their property to secure Rs. 1,50,000, alleged to have been borrowed from Miranda from time to time, to meet the wants of the plaintiff Company, and debentures to that amount were issued on the 20th June, 1898, a mortgage was executed in favour of Shankarlal Jethabhai to secure Rs. 50,000.

On the 31st August, 1898, the plaintiff Company executed in favour of Mr. Tata a mortgage on their property to secure Rs. 3,50,000, and in a memorandum on the document it is stated that the Rs. 3,50,000 were paid as follows:—

			Rs.	s.	p.
To Govindji Thackersey Mulji and Virchand Dipchand,					
Debenture Trustees	...	...	53,223	5	4
Debenture Trustees	...	...	1,50,000	0	0
Shankarlal	...	...	50,000	0	0
The Company	...	...	96,776	10	8

On the 13th October, 1899, the plaintiff Company was wound up under an order of the Court, and Mr. C. A. Turner was appointed Official Liquidator.

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On the 2nd May, 1900, Mr. N. C. Macleod was appointed Official Liquidator in Mr. Turner's place.

At page 9 of the plaintiff Company's ledger is the defendant Miranda's current account, and therein are given the items which are said to have made up the sum for which Rs. 1,50,000 were paid to him out of the Tata mortgage moneys.

Those items are 8 in number. The first three aggregate Rs. 48,458-14-0, and the remaining Rs. 1,01,541-2-0.

The plaintiff Company's books show that on the 18th August, 1898, there was a cash balance to the plaintiff Company's credit of Rs. 1,26,659-2-2. On that date Douse became the sole Secretary, Treasurer and Agent of the plaintiff Company, and thenceforth that balance is not shown in the Company's books.

In the course of the winding up proceedings Douse was ordered to pay the Official Liquidator the sum of Rs. 1,26,659-2-2 and the hypothesis on which that order proceeded was that this amount was an existing asset improperly taken by Douse from the plaintiff company's coffer.

Rs. 20,000.

On the 28th of August 1900 ~~this suit was commenced with the~~ leave of the Court, and the plaintiff company prays that the defendants may be decreed to pay to the plaintiff company the sum of Rs. 1,01,541-2-0 or such other sum as may be found to have been improperly received by them.

This suit in contradiction of the grounds on which the order in winding up proceedings was made is based on the allegation that the sums amounting to Rs. 1,01,541-2-0, to which I have already referred, or parts thereof, were fictitiously credited to Miranda, and that the same were not paid to the plaintiff company.

The plaintiff company's case as stated in the plaint is shortly this :—

That Douse was to the knowledge of the defendants considerably overpaid for the machinery which he actually supplied to the plaintiff company under the agreement :

That in the month of July 1897 Douse agreed with the defendant Miranda to purchase his interest in the firm of agents and also his shares in the plaintiff company :

That on the 26th of January 1898 Douse agreed to purchase from the defendant Lakshmishanker his interest in the firm of

agents and also 134 shares in the plaintiff company held by the 1st defendant.

That Douse having no money to carry out the agreement of the 26th January 1898, he and the two defendants devised the fraudulent scheme by which the defendants and their friends should be paid the par value of the shares held by them out of moneys of the plaintiff company and Douse obtain sole control of the plaintiff company.

The scheme is described in the 13th paragraph of the plaint in the following terms :—

The said scheme was as follows :—The said T. Ralph Douse was to be made to appear as a large creditor of the said Company for moneys due to him for the said machinery and the 2nd defendant was to be credited with large sums in the books of the said company as for cash loans made by him to and for the said company which were to be shown as part of the cash balance in hand from day to day, and when the moneys so credited were equivalent to the par value of the shares held by the 1st and 2nd defendants and their friends, debentures for the said amount were to be issued to the said 2nd defendant in payment thereof and the said debentures were to be paid off by mortgaging the property of the said company, and the said T. Ralph Douse was to be debited with the aggregate amount of the said loans alleged to have been made by the said 2nd defendant as soon as all the shares of the 1st and 2nd defendants and their friends were transferred to the said T. Ralph Douse or his nominees.

[His Lordship, after discussing at length the evidence, as to the alleged fictitious advances, proceeded as follows :—]

The result of my several findings is that I hold that (a) the sum of Rs. 16,000, part of Rs. 23,000, (b) Rs. 1,650, (c) Rs. 17,000, and (d) Rs. 25,000, part of Rs. 40,000, have not been successfully impugned by the plaintiff company, or, in other words, that so far as the entries in Exhibit A 121 represent sums alleged to have been advanced by Miranda (and I here include Pereira's Rs. 10,000), they are not fictitious, but in so far as they represent sums alleged to have been found by Lakshmishanker they are, and that those sums, amounting in all to Rs. 41,891-2-0, were not paid to the plaintiff company.

There is I think good ground for the distinction I have drawn between the evidence adduced in favour of Miranda's advances, on the one hand, and Lakshmishanker's on the other. In Miranda's favour there are one or two facts that stand out prominently and which lend support to the conclusions at which I have

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arrived. In the first place, Miranda was a man of means, and it is beyond question that by the 1st of April he had honestly become a creditor of the plaintiff company to the amount of Rs. 48,458-14-0. It certainly is not shown that at that time he was a party to the scheme alleged in the plaint; it is I think conclusively proved, that of his impugned advances there was paid to the plaintiff company (a) Rs. 10,000 of the Rs. 23,000, (b) Rs. 10,000 of the Rs. 17,000 and (c) Rs. 25,000 of the Rs. 40,000, aggregating together Rs. 45,000.

I feel no doubt too, on the evidence, that the sum of Rs. 1,650 was actually paid to the plaintiff company.

This then leaves a balance of Rs. 13,000 out of the alleged total of Miranda's advances.

This sum of Rs. 13,000 is made up of the Rs. 6,000, part of the Rs. 23,000, and Rs. 7,000, part of the Rs. 17,000, and though with regard to them the evidence is not so strong, still, as I have already shown, it is (in my opinion) sufficient for the purposes of this case.

~~Miranda's evidence as to the application of the Rs. 1,50,000 received from Tata is that he paid thereout to Lakshmishanker Rs. 85,525 with interest, and this sum is said to represent Rs. 42,000 advanced by Lakshmishanker in April 1898 and Rs. 43,525-13-4 advanced by him in May.~~

The Rs. 42,000 is identified with Rs. 41,891-2-0, which I have held was not advanced. The difference being referable to the Rs. 108-14-0 which Miranda is said to have taken away when the sum of Rs. 19,891-2-0 was credited.

So much of the money borrowed by the plaintiff company from Mr. Tata as was applied in payment of these sums, has *prima facie* gone to discharge a false claim, and thereby Lakshmishanker has been wrongfully enriched at the expense of the plaintiff company on whom a fraud has been committed.

I first propose to consider how far Miranda is thereby affected. No doubt the whole of the Rs. 1,50,000 was paid to him as alleged in the plaint. Also it is involved in the findings at which I have arrived, that the sum of Rs. 1,50,000 was not due to him by the plaintiff company. Only so much was due as he himself found. But can he justify his receipt of that which was not advanced? The chief difficulty in this part of the case arises

from what I believe has been a failure on the part of Miranda to tell the Court the exact truth.

I have already stated, and need not now repeat, my reasons for not believing so much of the story as implies that the amounts said to have been found by Lakshmishanker actually passed through Miranda's hands. At the same time the receipts handed to Miranda in the name and on behalf of the plaintiff company were a distinct representation to him that those amounts had been received and were treated as advances by him.

Did he then believe those representations? I see no reason for holding that he did not; though he had been an official of the plaintiff company, I doubt whether he ever knew much about its inner working; on the 4th of April he had actually sent in his resignation which was subsequently accepted, and I do not believe at the time the advances are said to have been made, he knew that the amounts were not paid to the plaintiff company. I am therefore of opinion that he was entitled to believe, and actually did believe, what the receipts represented, and that in the circumstances he received from out of Mr. Tata's advance the Rs. 1,50,000 odd in good faith and believing that the same was properly payable by the plaintiff company and distributable between him and Lakshmishanker. It is true that this is not in accordance with the letter of Miranda's evidence, but then I have disbelieved the suggestion that actual cash passed to and fro between him and Lakshmishanker. At the same time we have the fact that documents were furnished to Miranda, showing that the plaintiff company had received the amounts advanced, and the reasonable inference for him to draw would be that advances to the amount specified had been made by Lakshmishanker, for it never was pretended that Miranda had found the money for the whole of Rs. 1,50,000.

Under all the circumstances I do not think it would be right or a safe conclusion to pin Miranda literally to the version he has given in the witness-box, and I hold therefore that as against Miranda no conscious participation in the scheme and fraud alleged is established and that no decree in respect of the fictitious credits can be passed against him.

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But these considerations do not apply to Lakshmishanker, he was a direct party to the fraud and was the person who benefited by it.

There can be no doubt, that in this view of the facts, Lakshmishanker would ordinarily be liable to repay to the plaintiff company this sum of Rs. 41,891-2-0; it only remains to be seen whether the circumstances of this case afford any defence to this liability.

Though originally raised in the pleadings the plea of limitation has been abandoned and has not been made the subject of argument before us.

In fact the only legal points urged have been (1) that the cause of action did not bring the case within the jurisdiction of the Court and (2) that this suit is barred by the proceedings and order against Douse.

The point of jurisdiction was urged but faintly, and Mr. Davar did not address us on it, and with good reason, for it is clear that the payment of the Rs. 1,50,000, which is a part of the cause of action, was made in Bombay. I therefore hold that this plea fails.

Then are the proceedings and order against Douse a bar to the suit?

To answer this question it will be as well to set out precisely what happened in those proceedings.

In the winding up of the plaintiff company Mr. Justice Russell passed an order against Douse directing him within four days to pay the Official Receiver "the sum of Rs. 1,26,659-2-2 being the balance to the credit of the above company appearing to be in cash in the hands of the said T. Ralph Douse and to which the said company is *prima facie* entitled."

This order was made *ex parte* and apparently under section 149 of the Indian Companies Act.

On a summons taken out by Douse for revocation of the order it was confirmed with costs.

The order against Douse proceeded on, or at any rate involved, the theory that the plaintiff company had actually received the amounts, which I have held were fictitiously entered, and that

theory is inconsistent with the allegation on which this suit is based.

Ordinarily he who seeks assistance from the Court cannot for the purpose of securing to himself a further measure of relief assert that, on the negation of which, relief has already been awarded to him in relation to the same transaction.

But I do not think this rule applies here where the earlier relief the plaintiff has obtained against Douse is an order under section 149 of the Indian Companies Act on the basis of false representation, for which Lakshmishankar was responsible. The accounts of the plaintiff company were kept and signed from time to time by Lakshmishankar, and they represented the amount to which the order related as actually received : on the faith of that representation the liquidator took proceedings against Douse : further investigations have shown (in my opinion) that this representation was to the extent I have indicated false, and it follows, I think, that Lakshmishanker, who was in this manner responsible for the official Liquidator's proceedings, cannot be heard to say that the plaintiff company is now estopped. There was no election with knowledge of the facts ; the liquidator acted in ignorance of the facts and that ignorance was the reasonable and natural consequence of Lakshmishanker's fraud.

But while I am dealing with this matter I cannot refrain from commenting on the *ex parte* order passed in the 1st instance against Douse. I have had occasion from time to time to express my opinion that in the conditions which prevail here the practice of passing *ex parte* orders involving the person affected in serious liability is much to be deprecated, and this case illustrates the danger that lies in the tendency towards such orders that undoubtedly exists ; for it is conceded, and is obvious, that the order was passed on contentions which have been repudiated in this suit. I feel the more constrained to refer to this matter as the learned Judge has laid it down as a rule of procedure that in the cases he indicates *ex parte* orders should ordinarily be passed where proceedings are taken under section 149 of the Indian Companies Act. I cannot agree with that view and I earnestly hope that *ex parte* orders will not under that section or otherwise be treated as a matter of course.

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They should in my opinion be granted with the greatest caution, and where rapid action is desired it is always possible under the rules of this Court to serve with leave short notice of any application to the Court.

There is one other point that I desire to consider, and that is whether there is such a variance between the pleadings and my findings that we ought to withhold relief.

The plaintiff company has in my opinion failed to establish the scheme as alleged in para. 13 of the plaint, but has proved that a part of the Rs. 1,01,541-2-0 was fictitiously credited to Miranda, (see para. 24 of plaint) and that the 1st defendant fraudulently obtained payment from the plaintiff company of the amounts fictitiously credited without any consideration (para. 26). There is much therefore in the plaint that has not been proved but enough fraud has been established in Lakshmi-shankar to entitle the plaintiff company to a decree against him had it stood alone, and so the case appears to me to fall within the principle enunciated in *Moxon v. Payne*⁽¹⁾, where it is said :—

“It is true that when a case is based on fraud, the fraud must be proved, and no relief could be given in this suit on any different ground. But the obtaining of property, or of any benefit, through the undue and unconscientious abuse of influence by a person in whom trust and confidence are placed, has always been treated as a fraud of the gravest character; and if such frauds are alleged and proved, the allegation that they were parts of a scheme very early conceived and deliberately carried out is, whether it be made out or not, of no material consequence in such a suit. It is at most a rhetorical exaggeration, which a person who commits the frauds has no right to complain of. If a man robs his fellow traveller, and is indicted for so doing, the allegation that he became the companion of his victim with a pre-conceived design to rob him is wholly immaterial.

Much the same line of defence was taken in the case of *Huguenin v. Baseley*,⁽²⁾ and it may be worth while to quote what Lord Eldon said in that case; ‘I agree, further, that the relief must proceed upon what is alleged and proved by the persons complaining, that their complaints must be treated as effectual or ineffectual according to what they have, not what they could have, represented. . . . I have, therefore, looked through this bill with reference to the frame of it, and I have no doubt this case might have been more clearly reached if the situation of the parties had enabled them to go through all the difficulties as to amendment; also that many circumstances might have been

(1) (1873) L. R. 8 Ch. 581, at p. 587.

(2) (1807) 14 Ves. 273, 290.

brought forward on behalf of the defendants, which I am bound not to look at. But, taking the case as it stands, though there is in this bill much foul allegation, which, if not true, ought not to be there, and a great deal of which is denied and clearly disproved, there is enough upon the bill and in evidence to show that this deed cannot stand, if the whole transaction taken together cannot stand.'

The plaintiffs have, in our judgment, substantially proved the material allegations of fraud in respect of the several transactions by which the defendant *Payne* has appropriated their property, and they are entitled substantially to the relief they have prayed."

The result then is that so far as *Miranda* is concerned we confirm the decree of the 1st Court with costs, but *Lakshmi-shanker's* case demands further consideration on a point that has not been as yet argued before us.

This is a matter of some importance and before disposing of it we think it right to give the parties an opportunity of placing before us their contentions in relation to it.

On the 16th September 1904, after further argument the following judgment was delivered by the Court:—

JENKINS, C. J.—We now have to decide what course should be taken with reference to *Lakshmishanker's* claim to set off Rs. 57,930.

This claim was asserted in his written statement; no issue however on the point was raised: no pronouncement on it was made by the 1st Court: it was not made the subject of any cross-objection; nor was it urged before us in argument.

Therefore, the appellant contends, *Lakshmishanker* cannot be permitted to advance the claim at this stage of the suit.

Reliance too is placed on the judgment of Mr. Justice Scott in *The New Fleming Spinning and Weaving Company, Limited, v. Kessouji Naik*.⁽¹⁾

I will deal with the 2nd of these points first: it is argued that as the plaintiffs' claim was to make the defendants jointly and severally liable there cannot according to the opinion of Mr. Justice Scott be a set off. But the liability here is (in our opinion) *Lakshmishanker's* alone and clearly as against that this claim if established can be set off.

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(1) (1885) 9 Bom. 373 at pp. 403 and 404.

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But then is Lakshmishanker debarred from the benefit of this set off by the failure to claim it in the lower Court? Section 146 of the Civil Procedure Code casts on the Court the obligation of framing issues, and under section 566, if the Court against whose decree, an appeal is made, has omitted to frame or try any issue or to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues for trial, and may refer the same for trial to the Court, against whose decree the appeal is made, and in such case shall direct such Court to take the additional evidence required.

The first question then is whether this claim of set off appears to us, as an appellate Court, essential to the right decision of the suit.

On this I think there can be no doubt; if the claim is not allowed Lakshmishanker will be obliged, so far as he can, to pay the amount decreed against him in full, while he will (as far as we can see) be unable to recover in respect of his claim anything more than such dividend (if any) as the Insolvent Company's assets will allow.

That the claim of set off forms an integral part of the suit is plain from the language of section 116.

Therefore I am of opinion that it is essential to the right decision of the suit that appropriate issues should be framed and tried with a view to determining the validity of Lakshmishanker's claim to set off the Rs. 57,930.

Then it only remains to consider whether there is any obstacle in the way of our acting under section 566.

In support of his argument that we cannot so act, the Advocate General has referred us to the decision of the Privy Council in *Nan Karay Phaw v. Ko Htaw Ah* ⁽¹⁾ and also to section 561 of the Civil Procedure Code.

But it is clear that the decision of the Privy Council does not govern the present case; apart from the fact that their Lordships doubted whether a set off could be pleaded to the claim advanced in that suit, it is to be noted that they made no pronouncement on section 566, which had no application to their Lordships' Board,

(1) (1886) 13 Cal. 124 : L. R. 13 I. A. 48.

and that the circumstances under which the determination was there given, differ from those with which we are now concerned, and in the exercise of discretion each Court must be guided by the exigencies of the particular case.

If this case had gone to the Privy Council or come to us on second appeal without the point being raised different considerations would have arisen.

Nor do I think that section 561 places any obstacle in our way; it is not as if Mr. Justice Tyabji had decided the point adversely to Lakshmishanker: he has not dealt with it, and so it falls (in my opinion) within the operation of section 566.

No doubt there is evidence on the record relevant to the question, but I think the Advocate General is entitled to claim that we should not decide the question on it alone: in the absence of an issue it well may be, and the Advocate General assures us it is the case, that the plaintiff company did not adduce all the evidence available to refute Lakshmishanker's demand.

No doubt the expense of the litigation will be increased by our proceeding in the manner authorised by section 566, but when we come to deal with the question of costs we will not overlook the rule that the party by the act of whose counsel a difficulty has arisen must ordinarily pay the costs (*Neale v. Gordon Lennox*)¹.

I think too this is a case where the plaintiff Company may fairly ask for security for costs and that we should require Lakshmishanker to furnish security to the amount of Rs. 1,000 to be deposited in Court within a fortnight from this date and with liberty to the plaintiff company to apply to the 1st Court for further security in case the hearing is not completed on the 2nd day.

The issues we frame and refer for trial to the 1st Court are:

1. Has the defendant Lakshmishanker lent to the plaintiff company at different times the sum of Rs. 57,930 or some other and what sum?

2. How much is now due from the plaintiff company in respect thereof?

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(1) [1903] A. C. 435 at p. 471.

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3. Is the defendant Lakshmishanker entitled to set off the same and have any and what judgment pronounced in respect thereof?

On the 26th November 1904, Tyabji, J., recorded the following findings on the issues remitted to him:—

Issue No. 1.—I find that Lakshmishanker has lent all the moneys which are mentioned in this issue, and that they are due with interest from their respective dates, *i. e.*—

Rs. 40,000 due with interest at $7\frac{1}{2}$ per cent. from 7th September 1898.

„ 8,000 „ „ 23rd December 1898.

„ 5,000 „ „ 27th January 1899.

„ 500 „ „ 6 11th April 1899. I say 6 per cent. here because there is no specific evidence as to the rate of interest.

„ 151 „ „ 6 per cent. from 18th September 1899. Here also I say 6 per cent. because no particular rate of interest is proved.

„ 279 „ „ With 6 per cent. interest but this must be taken from the date when the claim was received by the official Liquidator, *viz.*, 22nd November 1899.

Then there is also due Rs. 3,578-7-0 in respect of the decree and interest and costs from the 17th January 1903 which I take to be the date when it was paid off.

Issue No. 2.—I find all these sums are due to the defendant Lakshmishanker with interest from the different dates as I have already stated.

Issue No. 3.—I find that Lakshmishanker is entitled to set off all the above sums and interest on them as against the sum of Rs. 41,891 and interest for which the appellate Court has held him liable.

The appellant filed objections to these findings.

Inverarity, Raikes, Lowndes and Padshah for the appellants (plaintiffs).

L. M. Wadia and Kanga for respondent (defendant 1).

JENKINS, C. J.—The sums, which the defendant Lakshmishanker seeks to set off, are:—

Rs. 40,000 with interest at $7\frac{1}{2}$ per cent. from 7th September 1898.

Rs. 8,000 „ „ 23rd December 1898.

Rs. 5,000 with interest at 7½ per cent. from 27th January 1899.	
Rs. 500 " "	11th April 1899.
Rs. 151 " "	18th September 1899.
Rs. 279	
Rs. 3,578-7-0	

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These being the amounts in respect of which Tyabji, J., found that his claim is established.

The plaintiff company disputes this finding except as to the sums of Rs. 5,000, Rs. 500, Rs. 151, Rs. 279, and Rs. 3,578-7 and even as to them objection is taken that no right to set off exists.

The sum of Rs. 40,000 is made up of three sums of Rs. 20,000, Rs. 17,000 and Rs. 3,000: the first two are said to have been paid to the plaintiff company by the endorsement to Douse, as its agent, of two cheques for those amounts respectively, drawn by Miranda in Lakshmishanker's favour, and the third by a cheque drawn by Lakshmishanker.

The evidence has been minutely discussed by Tyabji, J., and he has come to the conclusion that Lakshmishanker is entitled to this sum of Rs. 40,000 from the company.

The reasoning of the learned Judge has been criticised before us, and in particular it has been urged that he has fallen into three errors. First, it is said, he was wrong in stating that there was the evidence of Miranda, Lakshmishanker, and Douse concurring in the story that the three cheques aggregating Rs. 40,000 were paid over to the plaintiff company as a deposit, inasmuch as Miranda does not speak directly to the deposit.

But I think this is hypercriticism: it is clear what the Judge meant, as he sets forth Miranda's evidence, which goes to show that Lakshmishanker had the means to pay the Rs. 37,000.

Then it is said that the learned Judge was in error so far as he may have supposed that the cheques for Rs. 37,000 were endorsed to Douse as agent of the plaintiff company, and have omitted to notice that the amount of the cheques was paid into Douse's Bank.

But notwithstanding these criticisms I agree with the conclusion of the learned Judge that Lakshmishanker should be regarded as a creditor of the plaintiff company for this sum of Rs. 40,000.

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It is true that the entry in the plaintiff company's book treats the Rs. 40,000 as received from Douse, but giving to this all the weight it deserves, I do not think it is sufficient to turn the scale against Lakshmishanker.

Douse at the time was the sole agent; in that character he was vested with power to take the advance from Lakshmishanker for the plaintiff company; and I hold that he in fact so took it.

Mr. Justice Tyabji has further held that Lakshmishanker is a creditor for the Rs. 8,000.

Accepting as I do, the learned Judge's conclusion that as against the plaintiff company the *hundi* was without consideration, and that Lakshmishanker took it with that knowledge, I am unable, in the circumstances of the case, to agree with the opinion that Lakshmishanker can be treated as a creditor of the plaintiff company in respect of that sum.

The learned Judge thought that if the claim of Lakshmishanker had rested merely upon the *hundi* he could not have succeeded but he apparently held that the *hundi* must be taken to have been paid off as if the whole amount had been paid in cash, and that thus the present must be regarded as a claim to recover back cash.

But this is not what actually happened, and having regard to Lakshmishanker's knowledge there can be no application of the principle of estoppel which improves his claim. His claim must ultimately be referred to the *hundi*, and he, therefore, cannot stand as a creditor against the plaintiff company for its amount.

Nor can the claim to set off in this suit the sum of Rs. 3,578-7-0 be allowed. The particulars of this debt are not contained in any written statement tendered by Lakshmishanker, it was not even mentioned to us when the suit was last in this Court, and is not included in the issues sent down.

Therefore the claim cannot now be entertained.

Lakshmishanker's claim therefore must be limited to the sums of Rs. 40,000, Rs. 5,000, Rs. 500, Rs. 151, and Rs. 279, with such interest thereon as may be sanctioned.

But it is argued for the plaintiff company that there is an answer to this claim to set off, over and above the objections which were urged when the appeal was last before us. It is argued

that there can be no set off because we have not mutual dealings, and, having regard to the provisions of the Indian Companies Act and the fact that the plaintiff company is in liquidation, Lakshmishanker must discharge his indebtedness to the plaintiff company in full, and himself be limited to a proof in the plaintiff company's winding up proceedings.

The claim to set off is rested on section 111, Civil Procedure Code, which runs as follows:—

“If in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, and if in such claim of the defendant against the plaintiff both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, tender a written statement containing the particulars of the debt sought to be set-off.

The Court shall thereupon inquire into the same, and if it finds that the case fulfils the requirements of the former part of this section, and that the amount claimed to be set-off does not exceed the pecuniary limits of its jurisdiction, the Court shall set-off the one debt against the other.

Such set-off shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross claim; but it shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.”

This is a suit for the recovery of money, and Mr. Inverarity concedes that illustration (c) to the section answers the first objection urged by him.

What Lakshmishanker claims is an ascertained sum of money, but it is suggested that it is not legally recoverable, as Lakshmishanker's remedy is only proof in the liquidation, where probably he would recover, not the whole of this ascertained sum but only a dividend.

In my opinion the words legally recoverable have no reference to the ability of the debtor to pay the demand in full, and a sum is legally recoverable though in the result the creditor must be satisfied with a dividend.

Then it is objected that in the claim of Lakshmishanker against the plaintiff company both parties do not fill the same character as they do in the plaintiff company's suit, as the plaintiff company, it is said, changed its character when it went into liquidation. It is sought to support this contention by the judgment in

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The Ince Hall Rolling Mills Co. v. The Douglas Forge Co.⁽¹⁾, where it was held that though after its winding up a company may with proper sanction continue to carry on its business, it does so "in a new interest and a new capacity," and on that ground it was determined that the right of set off claimed therein could not be allowed. But of the two debts in that case one was created before, and the other after the liquidation; had both been before, then in the view of the Court they would have been in "the same interest and could have been set off one against the other."

"That case was decided upon the principle that the goods supplied by the liquidator were supplied in performance of a distinct contract with him: and, of course, a liquidator selling the goods of a company would not sell them to a man who would pay the price by set-off." *Mersey Steel and Iron Company v. Naylor*⁽²⁾.

Here each liability arose prior to the liquidation, though the amounts were ascertained after it, and neither results from a dealing with the liquidator, so there is nothing in the decision, which compels us to hold that in the claim and in the plaintiff's suit both parties do not fill the same character.

Then we have been referred to those cases, of which *Ex parte Pelly*⁽³⁾ is one, in which it has been held that a director has no right to set off a debt due to him from the company against a claim made by the liquidator under section 165 of the Companies Act, 1862, with which section 214 of the Indian Companies Act corresponds.

But in *Ex parte Pelly*⁽³⁾ reliance was placed on the fact that the proceeding before the Court was one under section 165 of the Companies Act and thus outside the scope of the statutory rule of set off. Both Jessel M. R. and Brett L. J. seem to have assumed that had it been an action the result would have been different.

The position here is different: the proceeding is a suit to which the right of set off as defined in section 111 of the Civil Procedure Code is precisely applicable, and I can see no sufficient reason for not giving due effect to the plain words of the section.

(1) (1882) 8 Q. B. D. 179.

(2) (1882) 9 Q. B. D. 648 & p. 669.

(3) (1882) 21 Ch. D. 492.

The amount thus due to Lakshmishanker must be set off against the plaintiff company's demand but as provided by section 111 of the Civil Procedure Code not so as to affect the lien upon the amount decreed of either attorney in respect of the costs payable to him under the decree.

Looking at all the circumstances the proper order as to costs will be that Lakshmishanker do pay one-half of the plaintiff company's costs of the suit and appeal to this date exclusive of the costs of his claim, and that the plaintiff company do pay three-fourths of Lakshmishanker's costs of his claim to set off commencing with the proceedings on remand and in respect of these costs there will be set off as between them and also such set off of costs against the sum found due as is provided by section 221 of the Civil Procedure Code. The amount due to the plaintiff company is (a) Rs. 41,891-2, (b) interest on that sum at the rate of 8 per cent. from the 1st May 1893 to the 7th September 1898, both inclusive, and (c) interest at that rate on Rs. 1,591-2 from the 8th of September 1898 to the 27th of January 1899, both inclusive.

The amount due to Lakshmishanker is (a) the aggregate of the sums of Rs. 40,000, Rs. 5,000, Rs. 500, Rs. 151 and Rs. 279, (b) interest on the balance of Rs. 5,000 after deducting therefrom Rs. 1,891-2 at $7\frac{1}{2}$ per cent. from the 27th of January 1899 to the 4th of September 1899, and (c) interest at 6 per cent. on the Rs. 500 from the 11th of April 1899 to the same date.

The decree must be drawn up in accordance with section 216 of the Civil Procedure Code, and after stating the amount due to the respective parties shall be for the recovery of the sum which shall appear to be due.

The decree must also direct the set off in respect of costs for which provision is made in section 221 and also a set off of the costs of the respective parties.

Decree accordingly.

Attorneys for appellants :—*Messrs. Bhaishanker, Kargu and Girdharlal.*

Attorneys for respondents :—*Mr. K. B. Mehta and Messrs. Pestonji, Rustim and Kola.*

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*Before Mr. Justice Tyabji.*1935.
March 18.ZULEKABAI, WIDOW (PLAINTIFF), v. AYESHABAI, WIDOW AND
ANOTHER (DEFENDANTS).**Practice—Chamber proceedings—Certifying Counsel.*

In certifying Counsel in chamber matters the Court ought to have regard to the following circumstances :—

(1) Whether notice has been given by either side of the intention to employ counsel.

(2) Whether the matter to be dealt with involves the consideration of complicated facts or merely of simple facts.

(3) Whether there arises any substantial question of law which has to be argued and discussed.

PER CURIAM :—The rule as to certifying Counsel has been interpreted as meaning that Counsel should be certified unless it is not a fit case for Counsel.

PROCEEDINGS in chambers.

This was a notice issued under section 245B of the Civil Procedure Code (Act XIV of 1882), calling upon Puran bin Hussanbhai to show cause why he should not be committed to jail in execution of a decree. The decree directed him to pay Rs. 50 every month as maintenance to Zulekabai (plaintiff No. 1) and her minor daughters.

Raikes, for the plaintiff.

D. D. Davar, for the defendant No. 2.

TYABJI, J.:—I think the notice must be made absolute with costs.

As to certifying Counsel it is important to maintain a continuity and uniformity of practice.

I think I should have regard to the following considerations :—

(1) Whether notice has been given by either side of the intention to employ Counsel.

(2) Whether the matter to be dealt with involves the consideration of complicated facts or merely of simple facts.

(3) Whether there arises any substantial question of law which has to be argued and discussed.

I am desirous of acting on principles which are capable of being stated clearly and succinctly.

* O. C. J. Suit No. 37 of 1904.

The rule as to certifying Counsel has been interpreted as meaning that Counsel should be certified unless it is not a fit case for Counsel. I should myself have felt inclined to put a stricter interpretation on the rule, but the practice has been the other way; and I do not think I should be justified in disregarding the practice followed by my predecessors.

It seems to me that if either party gives notice of his intention to employ Counsel, that party at any rate acknowledges, that, in his opinion, the matter is fit for employment of Counsel. Again, if the question involves the discussion of complicated facts, or of any substantial question of law, I think Counsel should be certified.

In this case

(a) Notice has been given by the plaintiff that he will employ Counsel.

(b) A question has been raised as to whether the defendant should be compelled to pay under the circumstances stated in the affidavit.

I cannot say that the employment was improper: or that there was no substantial question of law and fact to discuss.

Therefore I will certify Counsel.

Counsel certified.

Attorneys for the plaintiff:—*Messrs. Mulla and Mulla.*

Attorney for the defendants:—*Mr. M. B. Chothia.*

R. R.

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*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batchelor.*

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v. HAJI ABDUL RAHIM HAJI HAMED (PLAINTIFF), RESPONDENT.*

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April 10.

Cutchi Memons—Succession—Marriage in approved form—Hindu Law.

In the absence of proof of any special custom of succession, the Hindu Law of inheritance applies to Cutchi Memons.

The legal consequences of the classes of marriage, the approved and disapproved, in relation to inheritance, vary according as their leading characteristics are blameworthy or not, and suggest the inference that it is the quality

* Appeal No. 1315, Suit 412 of 1902.

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and not the form of marriage that decides the course of devolution: where the marriage is approved the husband and his side come in, where disapproved, they do not.

Ashabai v. Haji Tyeb Haji Rahimtulla⁽¹⁾ followed. In the goods of *Mulbai*; *Karim Khatav v. Pardhan Manji*⁽²⁾, and the case of the *Kojahs* and of the *Memon Cutchees*⁽³⁾ referred to.

APPEAL from Crowe, J.

The facts of this case as found in the Court below are as follows:—

Haji Salley Mahomed, a Cutchi Memon, died on the 24th December, 1898, leaving a will, dated 5th July, 1894, in which he appointed as his executrices his widow Mariambai and her mother Fatmabai, widow of one Haji Adam Haji Esmail. The will was proved on the 30th August, 1899. Various legacies were given under the will, including one of Rs. 10,000 to the widow Mariambai; Rs. 275 per annum were also set aside for certain anniversary ceremonies and a portion of the residue for feeding fakirs. On the 28th May, 1902, Mariambai died without having received the whole of her legacy of Rs. 10,000. On the 21st July, 1902, the plaintiff filed this suit, alleging that he was the nephew, brother's son, of the testator Haji Salley Mahomed and claimed as heir of Mariambai for the administration of the estate of the said Haji Salley Mahomed and for a declaration of his rights in that estate not only in his own right but also as heir of the said Mariambai. The executrix Fatmabai put in a written statement claiming to be the heiress of Mariambai and claiming all the property of her daughter, the said Mariambai, by virtue of a death-bed gift. On the 5th August, 1902, a receiver was appointed of the moveable estate and on the 12th December, 1902, under a Judge's order the following among other preliminary issues were set down for trial:—

1. Whether according to the law applicable to Cutchi Memons the plaintiff is the heir of Mariambai in the plaint mentioned.
2. Whether according to the custom applicable to Cutchi Memons the plaintiff is the heir of the said Mariambai.
3. Whether the plaintiff has any and what interest in the estate of the testator Haji Salley Mahomed.

(1) (1882) 9 Bom. 115.

(2) (1866) 2 Bom. H. C. R. 276.

(3) (1847) 2 Morley's Dig. 431.

4. Whether the suit is not bad for misjoinder of causes of action.

As to the first three issues the learned Judge of the lower Court held that the Cutchi Memons were as regards the order of succession and inheritance governed by Hindu Law, and that as there was no impropriety in the marriage of Mariambai the plaintiff was her heir. As regards the fourth issue, the learned Judge held there was no misjoinder of causes of action, as it was clear that all that was prayed for in the plaint was the administration of the estate of the deceased Haji Salley Mahomed. From this decision the defendants appealed and further evidence was recorded before the Court of Appeal as to the existence or otherwise of any custom of succession or inheritance among the Cutchi Memon community. On the 13th September, 1904, the Court of Appeal referred the case back to the lower Court to take further evidence as to custom. A number of witnesses, for the most part leading members of the Cutchi Memon community, were examined before the lower Court, and on the 24th March, 1905, the case again came before the Court of Appeal.

Setalvad with *Inverarity*, for the appellants.

We are only concerned with first two issues. On the death of Mariambai the property should go to her mother Fatmabai according to Mahomedan Law. The plaintiff sets up a custom against Mahomedan Law which is neither Hindu Law nor Mahomedan Law. Mariambai gets the property by the will of her husband, this would then be *stridhan*: *Sitabai v. Wasantrao*⁽¹⁾.

The devolution of *stridhan* depends upon whether marriage was in an approved form or not. That there is no hardship in applying Hindu Law in a case such as this. We cite the case of the Khojas who were originally Hindus, and were converted to Muhammadanism, retaining their Hindu laws and customs, and to whom, in the absence of special custom, Hindu law of inheritance should be applied. *Hirbai v. Gorbai*,⁽²⁾ *Shirji Hasam v. Datu Marji*,⁽³⁾ *In re Haji Ismail Haji Abdula*,⁽⁴⁾ *Rahimabae v. Hadji Jussap*,⁽⁵⁾ *In the matter of Haroon Mahomed*,⁽⁶⁾ *Ashabai v. Haji*

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(1) (1901) 3 Bom. L. R. 201.

(4) (1880) 6 Bom. 452, p. 460.

(2) (1875) 12 Bom. H. C. R. 294 at p. 305.

(5) (1847) Perry's O. C., p. 110.

(3) (1874) 12 Bom. H. C. R. 281.

(6) (1890) 14 Bom. 189 at p. 193.

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Tyeb Haji Rahimtulla,⁽¹⁾ *Abdul Cadur Haji Mahomed v. C. A. Turner*⁽²⁾.

These cases show that Memons are governed by Hindu Law. The case of *Ashabai v. Haji Tyeb Haji Rahimtulla*⁽¹⁾ applies technical law of *stridhan* to these classes. The *onus* of proving a custom of inheritance not in conformity with Hindu Law lies upon those who set it up.⁽³⁾ As to *stridhan* the devolution of Anvadhya Stridhan is according to the Mayukha, and therefore the whole law as to devolution applies. In this case there was no issue of the marriage and so further devolution must be governed by form of marriage. If the marriage is in an unapproved form it goes to heirs of the woman, and if in an approved form then to heirs of the husband: *Hunsraj v. Kesserbai*⁽⁴⁾. The marriage in this case cannot be said to be in an approved form as it was admittedly performed according to Mahomedan rites. But a Hindu marriage though in an unapproved form is valid.

This marriage we say is analogous to one of the lower forms of Hindu marriage where divorce is allowed.

Cutchi Memons were mostly Sudras and to assume this marriage to be in an approved form would be to apply neither Hindu nor Mahomedan Law.

As to the custom alleged in this case the plaintiff must prove it strictly as it is contrary to both Hindu and Mahomedan Law.

[JENKINS, C. J.:—Do you admit that on the death of a Cutchi Memon the widow would succeed ?]

We admit that.

Sudras are presumed to marry in unapproved forms. Mayne Hindu Law (6th Edn.), p. 97. Ghose Hindu Law, p. 603. We say there are eight forms of marriage and it is difficult to say which of them resembles this particular marriage.

Robertson and Lowndes, for respondent 1.

Bhandarkar and Bahadurji, for respondents 2, 3 and 4.

(1) (1882) 9 B.m. 115, pp. 120, 126.

(2) (1884) 9 Bom. 158 at p. 162.

(3) *Ibid*, p. 120.

(4) (1903) 6 Bom. L. R. 17

JENKINS, C. J.—Apart from the objection of misjoinder, the only point argued before us has been as to the rights of succession by inheritance to the property of a Cutchi Memon widow, for so the lady must be regarded, notwithstanding the doubt suggested here for the first time at a late stage of the argument that such was not her true description.

The lady's name was Mariambai, and she was the widow of Haji Sale Mahomed Haji Tar Mahomed, who left her by will the property in suit.

Mariambai died without issue, and the plaintiff is her husband's nephew and nearest heir, while the appellants are her nearest heirs in her parents' family: it is between the plaintiffs and the appellants that the contest lies.

It is beyond dispute that in the absence of proof of any special custom of succession, the Hindu Law of inheritance applies to Cutchi Memons: *Ashabai v. Haji Tyeb Haji Rahimulla*.⁽¹⁾

The property in suit, therefore, devolved as *stridhan* and so the succession must be determined by reference to the rule which draws a distinction in the devolution of that class of property according as the lady's marriage was approved or disapproved.

Crowe, J., decided in the plaintiff's favour, holding that Mariambai's marriage must, for the purpose of this rule of descent, be regarded as approved, and the case is before us on appeal from his decree. The record, since the case was before Crowe, J., has been amplified by the addition of evidence of custom.

The Hindu rule of descent is thus propounded in the Mayukha (Ch. IV, s. X; pages 97-98 of Mandlik's Hindu Law), which is the governing authority in this case:

"[As regards succession to] the technical *stridhana* in default of both kinds of issue, Yajnavalkya states a distinction [Ch. II, V. 144]:—

'Her kinsmen (*bandhavas*) take it, if she die without issue.'⁽²⁾

The same [author] expounds the succession of kinsmen according to the different kinds of marriage.⁽³⁾ 'The property of a childless woman married in the *Brahma* or any other [of the four approved forms of] marriage goes to her husband; in the remaining [four forms of marriage] it goes to her parents.'⁽⁴⁾ But if she leave female issue, [it will go to her daughter's daughters]⁽⁵⁾ Failing

(1) (1882) 9 Bom. 115.

(3) Yaj. Ch. II, V. 145.

(2) Vir. I. 218, p. 2; Kam. and Vya. M. (4) Vir. I. 218, p. 2; Kam. and Vya. M.

(5) Vijnanesvara (Mit. Ch. II, I. 68, p. 1) distinctly mentions daughter's daughters, and gives his reason for so doing.

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the husband, the nearest to her in his family takes it; [similarly] failing the father, the nearest to her in her father's family succeeds; as Manu in the text [Ch. IX, V. 187]:—‘Of the nearest *sapinda*, the wealth [of the deceased] shall be’ declares propinquity to the deceased as the criterion of the right to [take] wealth. As regards [the statement] in the Mitakshara ⁽¹⁾ that on failure of the husband, it goes to *tatpratyasanna* (the nearest to that) *sapindas*, and on failure of the father, to *tatpratyasanna* (the nearest to that) *sapindas*, even there the [word] *tatpratyasanna* is [to be dissolved as] *tena asyah pratyasanna* [the nearest to her] through him, so as to mean (‘the nearest in his family through him’). In the four [forms of marriage] beginning with *Brahma* relates to the Brahmana on account of these (forms) alone being lawful in respect to him. In the case of Kshatriyas and the rest, to whom the *Gandharva* [form of marriage] is lawful, the wealth of even her who has been married according to that [form] belongs to the husband alone. To the same effect [says] Manu [Ch. IX, VV. 196, 197]:—‘It is ordained that the property [of a woman] married in the *Brahma*, *Daiva*, *Arsha*, *Gandharva*, or *Prajapatya* form of marriage, and dying without issue, shall go to her husband alone; but it is ordained that if she obtained wealth when married in the *Asura* and the like form, on her death without issue, it goes to her mother and father.’”⁽²⁾

Now the Hindu system recognized eight kinds of marriage and no more, the *Brahma*, the *Daiva*, the *Arsha*, the *Prajapatya*, the *Gandharva*, the *Asura*, the *Rakshasa*, and the *Paishacha*. Of these the first four are commonly described as marriages in the approved form, and the last four as marriages in the disapproved form: and it will be convenient for the present purpose to accept that division, though according to some the *Gandharva* is under certain conditions to be regarded as in the approved form.

The argument for the appellants has been that, as the marriage between Mariambai and her husband was not in an approved form, the husband's family cannot take.

But there is an obvious fallacy in this: strictly speaking the marriage was in none of the eight forms, and is at least as far removed from those that are disapproved as from those that are approved.

In my opinion it partook more of the character of the approved. It was the highest form of union known to Cutchi Memons, and was free from all that was reprehensible, or that could call for censure, and in this it corresponded with the four approved kinds of marriage under the Hindu system, and is distinguishable from the four disapproved.

(1) Ch. II, I. 63, p. 1.

(2) Vir. I. 219, p. 1; Kam. and Vya. M.

The legal consequences of the classes of marriage, the approved and the disapproved, in relation to inheritance, vary according as their leading characteristics are blameworthy or not, and suggest the inference that it is the quality and not the form of the marriage that decides the course of devolution: where the marriage is approved the husband and his side come in, when disapproved they do not.

And so far as this affords any clue, then a marriage such as this between Mariambai and her husband should attract the consequences that amongst Hindus follow on a marriage in the approved form.

I would hesitate to hold that a marriage between Cutchi Memons could only create those rights of succession which are regarded by Hindus as the proper sequel of marriages deserving of censure, and whatever may be the infirmity of the evidence in the case as positive proof of custom, it at any rate shows that the views of the leading members of the community, including the Shet, justify this hesitation.

The position accorded to a Cutchi Memon widow in the line of succession tends to confirm the view that she is treated as one married in an approved form.

It is admitted that she comes in where the *Patni* would, and that she has rights of inheritance, not merely of maintenance: but the *Patni* is the lawfully wedded wife married in one of the approved forms of marriage: while she, whose union has been in a disapproved form, ordinarily is not a *Patni* and has no more than rights of maintenance.

Then again it has been decided as far back as 1866 that, by the custom of Khoja Mahomedans when a widow dies intestate and without issue, property acquired by her from her deceased husband does not descend to her own blood relations, but to the relations of her deceased husband: *In the goods of Mulbai; Karim Khataw v. Pardhan Manji.*⁽¹⁾

This decision may not be a direct authority on the question now before us, for it dealt with Khojas while we are concerned with Cutchi Memons, but it cannot be put aside as of no weight in view of the similarity of the conditions that govern both

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(1) (1866) 2 Bom. H. C. R. 276.

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communities. Sir Erskine Perry's judgment in *The case of the Khojahs and of the Memon Cutchees* ⁽¹⁾ opens with the remark that "the question which has arisen in the cases of the Khojahs and of the Memon Cutchees is founded on such similar states of fact, and depends so entirely on the same principles of law that it may be conveniently disposed of in one judgment." And then the Chief Justice proceeds to deal with the Khoja and the Memon Cutchi cases on the same footing.

So then we find that among the Khojas a rule of succession has prevailed for close on 40 years, which is in accordance with the rule of inheritance to a Hindu widow married in an approved form. This shows that the rule for which the plaintiff contends agrees with that which governs in a community to which his bears so close a resemblance, and that to treat a marriage between Cutchi Memons as leading to rights limited by Hindu Law to marriages in an approved form does not involve any absurdity or improbability.

Were it necessary to rest the plaintiff's case on specific instances of the course of descent he asserts, then it is doubtful whether his proofs would suffice for the purpose, but in the considerations with which I have dealt there is ample material to justify his contention, and I therefore hold that Crowe, J., rightly decided in his favour on this point.

I have alluded to the objection of misjoinder: it refers to the claim for administration of Mariambai's husband's estate. The claim is necessitated by the fact that Mariambai's legacy out of that estate has not been satisfied, and therefore is properly included in the suit.

At the same time the plaintiff has no desire to have the estate administered provided assets be admitted, and it be shown to his satisfaction that the executors have made the payments they allege on account of the legacy. We confirm the decree with costs including costs reserved except the costs of and incidental to the motion of 23rd September 1904 which must be borne by respondent 1. The costs of the Advocate General as between attorney and client. The accounts should not be proceeded with

(1) (1847) 2 Morley's Dig. 431.

without the leave of the Judge in Chambers. Liberty to the Advocate General to apply to the lower Court as to a scheme.

Attorneys for appellants : *Messrs. Tyabji, Dayabhai & Co.*

Attorneys for respondents : *Messrs. Ardeshir, Hormasji, Dinsha & Co.* and *Messrs. Tyabji, Dayabhai & Co.*

W. L. W.

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ORIGINAL CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batty.*

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DEOJI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

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Contract—Pakki Adat—Incidents of the custom—Employment for reward.

The plaintiffs in Bombay bought and sold in Bombay cotton and other products on the orders of the defendant who traded at Shahada in Khândesh. In respect of the transactions sued on the plaintiffs before due date had entered into cross contracts of purchase with the merchants to whom they had originally sold goods on the defendant's account. The transactions were entered into on *pakki adat* terms.

The contract of a *pakka adatia* in the circumstances of this case is one whereby he undertakes or guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted or differences paid : in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference.

The evidence in the case establishes the following propositions in connection with *pakki adat* dealings.

1. That the *pakka adatia* has no authority to pledge the credit of the up-country constituent to the Bombay merchant and that no contractual privity is established between the up-country constituent and the Bombay merchant.

2. That the up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross contracts with the Bombay merchant either on his own account or on account of another constituent, and thereby for practical purposes cancel the same.

3. The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent.

Held, that the defendant knew of the custom, which was not unreasonable as it did not involve a conflict between the *pakka adatia's* interest and duty.

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APPEAL from Chandavarkar, J.

The facts of this case found by the Court below were as follows :—

The plaintiffs, trading in Bombay under the name and style of Deoji Vassonji and Co., alleged in their plaint that for two years before suit they acted as the commission agents of the defendant, Bhagwandas Narotamdas, who traded at Shaháda in the Khándesh district under the name and style of Manecklal Jagjivandas ; that, as such agents, they from time to time under his instructions entered into contracts in Bombay for the sale or purchase of cotton, rice, or other produce ; that they also paid and received moneys on his behalf, honoured and paid hundis drawn by him and otherwise acted as his agents. The plaintiffs further alleged that in respect of their dealings and transactions on the defendant's behalf and as his agents in Samwat 1960, a sum of Rs. 7,217-10-3 had become due to them from the defendant, inclusive of interest up to the date of the filing of this suit ; that before filing the suit they sent an account to the defendant on the 31st of March 1904, showing a balance of Rs. 7,228-9-3 due from him, but that he denied his liability in respect of a sum of Rs. 8,473-5-6 debited to him for damages paid for 400 bales of Broach-ginned cotton sold on his account, of which he had failed to give delivery. The plaintiffs aver that this amount was rightly debited in the account and ask for a decree for Rs. 7,217-10-3 with further reliefs mentioned in the plaint.

The defence was that the plaintiffs had wrongly debited the sum of Rs. 8,473-5-6 in their account.

The whole suit was fought out at the trial in respect of that sum, the history of which, according to the undisputed facts of the case, is as follows :—

On the 15th of December 1903, the plaintiffs, who acted as the defendant's *pakka adatias*, received instructions from him to sell 400 bales of Broach machine-ginned cotton, good class, for forward delivery, 25th March 1904.

Accordingly, the plaintiffs entered into four contracts of 100 bales each as follows :—

(1) On the 15th of December 1903, one contract with Shamji Ladha for the sale of 100 bales, at Rs. 257-8-0 (Ex. A2).

(2) On the 15th of December 1903, two contracts with Bhimji Shamji, each for the sale of 100 bales, at Rs. 257-12-0 (Exs. A1 & A3).

(3) On the 16th of December 1903, one contract with Dharamsey Jetha for the sale of 100 bales at Rs. 257-8-0 (Ex. A4).

All these contracts were entered in the plaintiffs' *Soda* diary book, and the entries relating to them have been put in. Below the said entries occurs the following entry:—

"400: Credited to the account of Maneklal Jagjivan Broach cotton, 400 bales, 200 at the rate of Rs. 257-8-0, 200 at the rate of Rs. 257-12-0."

On the 16th of December 1903 the plaintiffs sent the following telegram (Ex. D) to the defendant:—

"Received two telegrams. Sold 400 bales Broach 257-10. Market steady."

The rate mentioned in this telegram differed from the rate of each of the contracts; but Canji Dewji, the 1st plaintiff, examined as a witness for the plaintiffs, explained that Rs. 257-10 was mentioned in the telegram because it was the average rate of all the four contracts.

The plaintiffs did not inform the defendant, however, of the names of the persons with whom they had contracted to sell.

On the 26th of January 1904, the plaintiffs entered into cross contracts with two of these persons, for the same *vaida*, and the same quality and description of cotton as follows:—

(1) Contract with Dharamsey Jetha for the purchase of 100 bales at Rs. 285-8-0.

(2) Contract with Shamji Ladha for the purchase of 100 bales at Rs. 285-8-0.

The plaintiffs entered into these two cross contracts for and on account of another constituent of theirs, *viz.* Purshotam Dharamsey: and their effect, as explained by the first plaintiff, Canji Dewji, in his deposition was that on the due date, the 25th of March 1904, there was to be no delivery of the goods but only the payment of the difference by the party that might become liable.

Then there remained the contract with Bhimji Shamji. The plaintiffs settled these by entering into cross contracts on their own account with him on the 24th March 1904 at 295. The room rate—the rate fixed by the Cotton Association—was on

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this date 307, but the plaintiffs settled these two contracts at 235, because, as stated by the 1st plaintiff Canji Dewji, the payment was made by them in cash. It is admitted by Canji that this cross contract was not a written one and that there is no entry as to it in the plaintiffs' books, because, it was a *cash difference transaction*. But the payment of cash difference is proved by the entry in the plaintiffs' *Journal*.

The result was that the two contracts, with Bhimji Shamji, for the sale of 200 bales, delivery on the 25th of March 1904, were squared by the plaintiffs one day before that due date, by means of the cross contract.

The cross contracts were entered into by the plaintiffs without any instructions from the defendant.

The plaintiffs contended that the defendant nevertheless continued liable on the due date—the 25th of March 1904—to deliver to them 400 bales in accordance with his instructions of the 15th of December 1903: and that as he failed to deliver he was bound to pay them the difference between the contract rates and the room rate, 307, which prevailed on the due date.

The plaintiffs based this liability of the defendant upon the *mercantile custom* which they set up as governing the *pakki adat* system in the Bombay market. The custom alleged, was to this effect. A *pakka adatia* is not, in the proper sense of the word, an agent or even a *del credere* agent. The relation between him and his up-country constituent is substantially one of principal and principal. The up-country constituent looks to him and to him only for the carrying out of his orders and the fulfilment of his contracts: there is no privity whatever, direct or indirect, between the constituent and the Bombay shroff or merchant. On the one hand, the *pakka adatia* is responsible to the constituent and *vice versa*: so, on the other, the *pakka adatia* is responsible to the Bombay shroff or merchant and *vice versa*. That being the position of the *pakka adatia*, when he has received an order from an up-country constituent to buy or sell, he can either appropriate the order to himself in the first instance, or, at his option, after having entered into a contract with a Bombay merchant in accordance with the constituent's order or instructions, he can square that contract by entering before the due date into a cross contract either on his own account or on account of another constituent. In either

case, the first constituent, dealing as he does with the *pakka adatia*, continues liable to the latter to fulfil his order and in default to pay damages.

The defendant contended that the *pakka adatia* was a *del credere* agent. He guarantees to his constituent the solvency of the Bombay shroff or merchant, and to the shroff or merchant the solvency of the constituent. He is no doubt entitled, according to the mercantile usage of the *pakki adat* system, to enter into a cross contract on behalf of a constituent after having entered into a contract on behalf and on account of another constituent and to square this latter by the cross contract; but he is bound in that case to substitute a fresh contract for the squared contract so that the constituent, for whom it was entered into, may have a contract to get performed or to perform, as the case may be, on the due date. If the *pakka adatia* squares the contract without such substitution, he cannot hold liable on the due date the constituent for whom the first contract was entered into.

The defendant contended further that in any case he was not liable, because on the 9th February 1904 he sent the following telegram from Nandurbár to the plaintiffs:—

“Buy Broach March gin 400 bales marketably profitably.”

It was conceded by the plaintiffs that the meaning of this telegram was:—

“Buy 400 bales of machine gin cotton for the March *váida* at the best rates obtainable in the market.”

The defendant argued that the plaintiffs were bound to carry out this order and square the order of the defendant sent on the 15th of December, but that they failed to do so, and having failed they could not fall back on the original order of the defendant and hold the defendant liable.

To this the plaintiffs' answer was that:—At the time the plaintiffs received this second order (Ex. N) from the defendant, their credit in the market was weak on account of some rumours affecting their solvency. In consequence of that, people were hesitating to enter into forward contracts with them, and they could not buy as desired by the defendant because they could not get the goods. Accordingly, as soon as the plaintiffs received the telegram (Ex. N) they sent a letter (Ex. O), dated the 10th

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February 1904, to the defendant's address at Nandurbár, whence the telegram had come, informing him of their inability to carry out his second order, and that he might instruct somebody else to carry it out. The mercantile usage prevailing as to the *pakki adat* system was that, when after a *pakka adatia* has entered into a contract under an order from his constituent, a second order is received from the same constituent to square that contract by a cross-contract before the due date, the *pakka adatia* is not bound to carry out the second order, if, owing to loss of credit or some other reasonable cause, he is not able to carry it out; and all he is bound to do is to inform the constituent of his inability so as to enable the latter to give the order to somebody else and get the contract squared.

The defendant, on the other hand, denied that a *pakka adatia* had any right to refuse to carry out the second order. But, apart from that, even assuming that the *pakka adatia* had such a right, the plaintiffs in this case did not inform him of their inability as they allege they did and that he received neither the letter of the 20th of February nor any of the others relied upon by the plaintiffs in support of their case on this question of inability. Further, that even if the Court should hold that the mercantile usage set up by the plaintiffs to be proved, he was not aware of it and did not deal nor intend to deal with the plaintiffs on its basis. Should the Court, however, hold he had been aware of the custom, the custom should be declared invalid on the ground that it was unjust and unreasonable.

The learned Judge held the custom of *pakki adat* proved and passed a decree in favour of the plaintiffs.

From this decree the defendant appealed.

Setulval with *Raikes* (Acting Advocate General) for the appellant.

Strangman with *Padshah* for the respondents.

JENKINS, C. J.:—The plaintiffs carry on business in partnership at Bombay as commission agents under the style of Dewji Vassonji, and the defendant trades at Sháháda Sultánpur in the name of Manecklal Jugjiwandas. The plaintiffs have, from time to time on the defendant's order, sold and bought cotton, rice and other products, and they allege that the result of their dealings is that there is due to them from the defendant a sum of

Rs. 7,217-10-3 with interest at 9 per cent. per annum from the 2nd of August 1904. The defendant denies that there is anything due from him, and on the contrary asserts that the plaintiffs are his debtors.

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The facts that have given rise to this litigation can be briefly stated. On the 15th of December 1903 the defendant telegraphed to the plaintiffs: "Sell 200 bales Broach March marketably." A similar telegram was sent on the same day directing the sale of 200 more bales. The plaintiffs thereupon sold to Bhimji Shamji & Co. 200 bales by two separate contracts at Rs. 257 $\frac{3}{4}$ per candy: they also sold 100 bales to Shamji Ludha & Co. at Rs. 257 $\frac{1}{2}$ per candy, and 100 to Dharamsi Jetha & Co. at the same price. On the same date they telegraphed to the defendant: "Received 2 telegrams, sold 400 bales Broach 257/10, market steady."

On the 16th December the plaintiffs wrote to the defendant: "Your letter and telegram have been received. Agreeably to what you wrote 400 bales of Broach (cotton) of March *várida* have been sold on your account. The particulars thereof (are as follows):—

200 bales (of) Broach ginned cotton were sold at Rs. 257 $\frac{1}{2}$.

200 bales of Broach ginned cotton were sold at Rs. 257 $\frac{3}{4}$.

"In this manner the bales have been sold on your account. Please note down the same."

On the 26th of January the plaintiffs bought from Dharamsi Jetha and Shamji Ludha 100 bales apiece, and the entry made, in respect of the purchase from Dharamsi Jetha, is as follows:—

"1,575 bales 100 weighing candies 50 were sold at the rate of Rs. 257 $\frac{1}{2}$ per candy. The same were purchased back at the rate of Rs. 289 per candy. The difference in respect of the same at the rate of Rs. 31 $\frac{1}{2}$ per candy amounts to Rs. 1,575."

An entry to the same effect was made of the purchase from Shamji Ludha. In like manner 200 bales were purchased back from Bhimji Shamji on the 24th of March 1904 at the rate of Rs. 295 per candy. According to the plaintiffs' evidence the sales of the 15th of December were thereby cancelled, and there can be no doubt that this is how the matter would be regarded by business men. It is on this ground that the defendant resists the plaintiffs' claim, for he urges that he can come under

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no liability in respect of his order of December, as the contracts then made were not kept open till due date : the plaintiffs' claim, it is argued, is really one of indemnity, and as the contracts of December were not kept intact, the plaintiffs have no right to the relief they seek.

Here it becomes necessary to determine what the contract was, into which the parties entered in December. It is profitless to look at the pleadings, for admittedly they give little or no clue to the rival contentions of the parties, and by common consent the case was fought in the lower Court without reference to them. The issues ultimately adopted were as follows :

(1) Whether the defendant is liable to be debited with Rupees 8,473-5 6 as plaintiffs seek to do in the account annexed to the plaint ?

(2) Whether the plaintiffs were not bound to carry out defendant's instructions given in the defendant's telegram of the 9th February 1904 ?

(3) Whether the sum claimed in the plaint or any other and what sum is due by the defendant to the plaintiffs ?

(4) Whether the defendant is entitled to a decree for his counter-claim made in paragraph 3 of his written statement ?

(5) Whether the commission and the brokerage charges are properly charged to the defendant ?

[Counsel subsequently intimated that there was no dispute as to this.]

(6) Whether according to the custom prevailing in the Bombay market, plaintiff is entitled to square the contracts of the Bombay merchants on his own account keeping the contract with the constituent open until the due date ?

(7) Whether in the event of the *pakka adatia* entering into cross contracts with the Bombay merchant or shroff, he is obliged to forthwith substitute another contract to meet that of his first constituent ?

(8) Whether in any event the *pakka adatia* is entitled to sue upon the contract with the constituent where he has a contract open at due date with either a Bombay shroff or merchant or another constituent to meet the contract of his first constituent ?

(9) Whether, according to the custom alleged by the plaintiff, a *pakka adatia* is entitled to deal with his up-country constituents as if he were a principal ?

(10) Whether the defendant was aware of the custom set up in issues Nos. 6, 7, 8 and 9 or of any and which of them ?

(11) Whether such a custom is valid in law ?

(12) The general issue.

The documentary evidence in the case taken alone points to the relation of principal and commission agent, as was held

in a similar case of *Chandulal Suklal v. Sidhruthrai*⁽¹⁾. But here we have what was absent there, a large body of evidence called to show that the relations between the parties were governed by the usage of the Bombay market known as the *pakki adat* system which, it is alleged, allowed the plaintiffs to deal with the December contracts in the way they did without prejudicing their claims against the defendant. It accordingly is necessary to examine this evidence and to see what it proves.

There are points, on which the evidence leaves no doubt; thus it is clear that the contract between the plaintiffs and the defendant was on *pakki adat* terms: then again it is amply proved that, where that is so, there is no privity between the up-country constituent and the Bombay merchant; both look to the *pakka adatia* alone. That is shown by the defendant's as well as the plaintiff's evidence. It is further established that the up-country constituent has not an indefeasible right to the contract or contracts into which the *pakka adatia* may enter on the receipt of the order to buy or sell, as the case may be. This is practically involved in Mr. Davar's admission even as narrowed down. But it further rests on the surer basis of the evidence given by the witnesses called in the case.

Mr. Bhaidass Narottamdass, who was called by the defendant to prove that the *pakka adatia* cannot enter into cross contracts, as the operation is termed, was emphatic in his examination-in-chief and also in the earlier part of his examination in support of the defendant's contention, but when in response to Mr. Strangman's request he produced his books, he was constrained to admit that he entered into cross contracts with Bombay merchants on his own responsibility on behalf of another constituent. Later he says "If I get a telegram at night to buy or sell there is nothing wrong if I appropriate the order to myself. . . . It is the custom among the *pakka adatias* to appropriate the orders to themselves or to enter into cross contracts on account of other constituents. They are entitled to do so on their own responsibility. No constituent has disputed with me his liability to pay merely because I had squared the contract I had entered into on his instructions by another contract under another

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constituent's instructions. Numbers of constituents knew that I had done so."

Turning then to the plaintiffs' witnesses we have the evidence of Mr. Raghunath Lalji, a partner in a firm that sells or buys as much as eighty or ninety thousand bales. He speaks to the custom of entering into cross contracts; "I can give," he says, "instances where I have entered into cross contracts on my own account in Bombay without informing the constituents up-country and have paid or recovered from them as the case might be according to the room rate prevailing on the due date. This is frequently done and that with the knowledge of the constituents up-country." Later on in his cross-examination he says, "when a *pakki adat* agent receives orders for sale on due date he is bound to find a corresponding order for purchase for that date from another constituent or merchant. In my case, however, it is necessary to do that because I don't trade on my own account; but where the *pakki adat* agent is himself a trader it is not necessary when he adopts the contract himself."

Evidence to the like effect is given by the representatives of several native firms, *e. g.* Messrs. Ludha Dossa, Padamsey Pasvi, Shivmukhrai Chunilal, and Shridham Gopinath [His Lordship referred to their evidence].

Of the representatives of European Houses I will first take Mr. Chrystal; speaking from a wide experience he says "According to the custom I am entitled to become the buyer or seller if I choose to. The constituent has nothing whatever to do with that question...Supposing I make a contract for sale with a Bombay merchant in execution of the order of an up-country constituent and after that another constituent gives me an order to buy and I buy from the said Bombay merchant so as to square the contract, I am not bound to substitute another contract for the original order...The custom I have spoken to is well known to up-country constituents. A *pakki adatia* cannot properly speaking be said to guarantee the solvency of either the constituent or the Bombay merchant; the word guarantee is a misnomer in such a case because the *pakki adatia* is himself primarily responsible to either....Up-country constitu-

ents of my firm settle business with me by letters; we use no printed forms."

And this brings me to the evidence of Mr. Campbell, the manager of Bruel & Co, who has had about 25 years' experience in Bombay. His evidence is all in favour of the custom, and Chandavarkar, J., evidently was much impressed with it. I in no way doubt the correctness of the learned Judge's appreciation. The only comment this witness' evidence invites is that his firm do their business on a form of contract which on its face shows them to be buyers or sellers, as the case may be, and so, apart from the custom the incidents to which he speaks would follow from its express terms. But making every allowance for this I still think the plaintiffs can justly claim that their case gains strong support from Mr. Campbell's evidence. The plaintiffs have thus called a considerable body of evidence to establish the custom they allege; nor is that all: for prior to closing his case Mr. Strangman addressed the Court as follows:

"I have a great many other witnesses to call to prove the custom, but I have made so far a selection to save time and if those already examined are not believed then I take it the Court may not feel inclined to believe the rest. So I do not propose to call the remaining witnesses. The Court may call if necessary or I will call if the Court requires. Subject to that I close my case."

To that the learned Judge replied: "If necessary I will tell you but at present I leave the matter where you leave it."

The evidence then appears to me to establish the following propositions in connection with *pakki adat* dealings in circumstances such as we have in this case:

1. That the *pakka adatia* has no authority to pledge the credit of the up-country constituent to the Bombay merchant, and that no contractual privity is established between the up-country constituent and the Bombay merchant.

2. That the up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross contracts with the Bombay merchant either on his own account or on account of another constituent, and thereby for practical purposes cancel the same.

3. The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent.

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But it is urged that though the evidence may establish these incidents, still effect cannot be given to them, for they disclose an unreasonable custom, as they involve a conflict between the *pakka adatia's* interest and duty. But that depends on what the duty is. The evidence does not (in my opinion) show that the relations between the *pakka adatia* and the up-country constituent is that of mere seller and buyer. Thus the contract makes provision for commission, and that, it has been said, is conclusive to show that to some extent there was the relation of principal and agent: *Armstrong v. Stokes* ⁽¹⁾. Then again there runs through the evidence the idea that the word *guarantee* is not inappropriate, though some of the witnesses under the stress of a skilful cross-examination repudiate its aptness. Guarantee in the strict legal sense there can be none; the absence of privity with the Bombay merchant excludes it. (See section 126 of the Contract Act). But I doubt whether there was occasion to be so shy of the word in its non-technical sense. On the other hand I do not think there was the relation of principal and agent pure and simple.

I would say here as I did in *Paul Beier v. Chotalal* ⁽²⁾: "the case is (in my opinion) not one to be decided by an attempt to bring the contract within the one or the other of the two categories of sale or agency; the provisions of the document are equivocal, some lean towards the one relation, some to the other. Therefore we must examine the document as a whole and in its several parts, and also the surrounding circumstances."

I think the contract between the parties was one of employment for reward, and the incidents proved appear to me to converge to the conclusion that the contract of a *pakka adatia* in circumstances like the present is one whereby he undertakes, or—to use the word in its non-technical sense as business men on occasion do use it (see *Barker v. M'Andrew* ⁽³⁾)—guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted, or differences paid: in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference.

(1) (1872) L. R. 7 Q. B. 598 at p. 604.

(2) (1904) 30 Bom. L. R. 13: 6 Bom. L. R. 943 at p. 950.

(3) (1865) 34 L. J. C. P. 191 at p. 194.

I do not say that there is no relation of principal and agent between the parties at any stage ; there may be up to a point, and that this is legally possible is shown by Mellish L.J. in *Ex parte White* ⁽¹⁾ where he speaks of "a person who is an agent up to a certain point." So here there may have been that relationship in its common meaning for the purpose of ascertaining the price at which the order was to be completed, and to this point of the transaction all the obligations of that relation perhaps apply. But when that stage is passed, I think the relation is not that of principal and agent, but of the nature I have indicated. Into this contract there is imported by the evidence of custom no such element of unreasonableness as would compel us to reject it on that score. It has been urged before us for the defendant that it is not open to us to find such a contract, as no issue was framed on the point. But to decide this suit, which is based on contract, we are bound to find what the contract was, and in finding the terms of the contract I am not going outside the four corners of the case. The issues were directed to ascertaining whether or not certain incidents belonged to the contract between the parties. I have come to definite conclusions as to those incidents, and on that basis I have endeavoured to cast into legal shape the relations between the parties. But lest the defendant should be prejudiced, he was offered an opportunity of further investigation ; he however declined, and I must do the best I can with the materials I have. I accordingly adhere on the evidence before us in this case to the propositions I have stated, and I further hold that they do not import into the contract a custom that is unreasonable.

There is one more aspect of the case which calls for brief notice. The defendant had prior to the suit dealt for some considerable time with the plaintiffs as *pakka adatis*, and the plaintiff, Canji Devji, after stating that the defendant came very often to Bombay and used to put up at the plaintiff's place, deposes "I can say myself that he was well aware of the custom spoken to by my witnesses."

The defendant never went into the witness-box to deny this knowledge, and I agree with the learned Judge that the reason given for his abstention cannot be accepted.

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I hold, therefore, with Chandavarkar, J., that the defendant was aware of the custom on which the plaintiffs rely.

BATTY, J.:—I concur.

Decree confirmed.

Attorneys for appellants: *Messrs. Mansukhlal, Jamselji and Hiralal.*

Attorneys for respondents: *Messrs. Payne & Co.*

W. L. W.

APPELLATE CIVIL.

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August 28.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Aston.*

YELLAPPA *bin* PARASHARAMAPPA (ORIGINAL PLAINTIFF), APPELLANT, *v.* DESAYAPPA *bin* KHALILAPPA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Money secured by a pledge—Suit for money lent—Limitation—Three years from the time of the loan.

A suit for the recovery of money secured by a pledge is a suit for money lent. The period of limitation is three years from the time the loan is made.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Bijápúr, confirming the decree of D. A. Idgunji, Subordinate Judge of Bágalkot.

One Sanganasappa pledged certain ornaments to the plaintiff for sums amounting to Rs. 4,850 at dates between the 2nd October 1890 and the 30th April 1896. Sanganasappa died in March 1897 and the Nazir of the Court was appointed guardian of his minor son Sangappa, who died in April 1901. On the 28th September 1901 the Nazir reported Sangappa's death to the Court and stated that there would be a dispute as to heirship and received the Court's permission to sell the pledged ornaments. After the sale the Nazir reported that Rs. 7,650-10-0 were due to the plaintiff, that Rs. 5,140 were the proceeds of the sale, that Rs. 20-10-0 were remitted by the plaintiff, that the balance of Rs. 2,500 was still due to the plaintiff, and that for the said balance he had passed to the plaintiff an acknowledgment dated

* Second appeal No. 219 of 1905.

the 1st September 1901. On the 23rd June 1904 the plaintiff brought the present suit to recover Rs. 2,500 and Rs. 590-10-0, interest thereon, in all Rs. 3,090-10-0.

Defendant 1, who along with the other defendants was the heir of Sangappa, deceased, contended that the Nazir had no right to acknowledge the debt, his ward being dead at the time, that the acknowledgment was not binding on them and that the claim was time-barred.

The other defendants were absent.

The Subordinate Judge dismissed the suit as time-barred.

On appeal by the plaintiff, the Judge confirmed the decree on the following grounds:—

The first contention that the Nazir's acknowledgment was the starting point of a new period of limitation is unsound. The Nazir's ward being dead, he had nothing further to do with the estate and could not bind it.

The second question is whether the right to sue for a debt secured by a pledge is for six years from the date of the pledge or from some date. No other terminus *a quo* than the date of the original pledge is assignable on any conceivable grounds. Deposit of a pledge is better security than execution of a registered bond. Why should then the creditor claim a larger period of limitation in the first case than in the latter. I agree with the Subordinate Judge that the starting point for limitation in this suit was at the various dates on which the respective loans were contracted, the latest of which is 30th April 1896. The suit was not brought till 1904. It is, therefore, time-barred.

Plaintiff preferred a second appeal.

Rao Bahadur G. N. Nadkarni, for the appellant (plaintiff):—He contended that under section 176 of the Contract Act the personal liability of a pawner arises out of the amount of the sale proceeds proving less than the amount of the debt. The deficit was found on the 1st November 1901, therefore the suit was in time.

There was no appearance for the respondents (defendants).

JENKINS, C. J.:—This is a suit for money lent and none the less so, because the money lent was secured by a pledge. The period of limitation for such a suit is three years from the time the loan is made. The suit, therefore, is rightly held by the lower Court to be barred, and we confirm the decree, but as there is no appearance by the respondent, without costs.

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v.
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APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Aston.*

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September 15.

MALUBHAI LADHABHAI AND OTHERS (ORIGINAL DEFENDANTS 16—41),
APPELLANTS, v. SURSANGJI JALAMSANGJI AND OTHERS (ORIGINAL
PLAINTIFFS AND DEFENDANTS 1—15), RESPONDENTS. *

*Gujarāt Talukdārs' Act (Bom. Act VI of 1888), sections 10, 11, 16 and 17⁽¹⁾—
Tālukdāri Settlement Officer—Decision—Appeal—Second appeal—Subse-
quent suit in a Court of competent jurisdiction—Res judicata.*

* Second appeal No. 78 of 1905.

(1) Sections 10, 11, 16 and 17 of the Gujarāt Tālukdārs' Act.

10. (1) Every person who has obtained a final decree of a Court of competent jurisdiction declaring him to be entitled to a share of a tālukdāri estate and every co-sharer whose name is recorded, as such, in the settlement register prepared in accordance with section 5 and, pending the preparation of the said register, every person whose title to any such share as aforesaid is not disputed by any other person claiming a share in the same estate, shall be entitled to have his share divided from the rest of the estate and to hold the same as a separate estate.

(2) Any two or more such co-sharers or persons shall be entitled to have their shares divided from the rest of the estate and to hold the same jointly as a separate estate.

11. Applications for partition shall be made to the Tālukdāri Settlement Officer or to such other officer as the Governor in Council appoints in this behalf.

16. (1) An appeal shall lie from any decision, or from any part of a decision, passed under the last preceding section by the Tālukdāri Settlement Officer or other officer aforesaid, to the District Court, as if such decision were a decree of a Court from whose decisions the District Court is authorized to hear appeals.

(2) Upon such appeal being made, the District Court may issue a precept to the Tālukdāri Settlement Officer or other officer aforesaid, requiring him to stay the partition pending the decision of the appeal.

17. (1) When it has been decided to make a partition, the Tālukdāri Settlement Officer or other officer aforesaid shall give the parties the option of making the partition themselves; in the event of their not agreeing, or of their failing to make the partition, within a period prescribed by the Tālukdāri Settlement Officer or the officer aforesaid in this behalf, the Tālukdāri Settlement Officer or other officer aforesaid shall either make it himself, or, if he thinks fit, shall entrust it to arbitrators appointed for this purpose by the parties.

(2) In making the partition, the Tālukdāri Settlement Officer or other officer aforesaid, and any person acting under his orders shall have the same powers to enter on the estate under partition, for marking out the boundaries, surveying the land and other purposes as are conferred on Survey Officers by the Bombay Land Revenue Code, 1879.

Certain proceedings which had arisen out of an application to the Tálukdári Settlement Officer under section 11 of the Gujarát Tálukdárs' Act (Bom. Act VI of 1888) went up to the High Court in second appeal.

Subsequently the same question having arisen between the same parties in a regular suit in a Court of competent jurisdiction,

Held that the question was not *res judicata*. A Tálukdári Settlement Officer is not a Court of jurisdiction competent to try the suit. He is an administrative officer according to the machinery prescribed by the Bombay Legislature.

"In considering the competency of a Court for the purpose of deciding on a question of *res judicata*," the Court "must look to the powers of the Court in which the suit was instituted, and not to the powers of the Court by which that suit was decided on appeal."

Toponidhee Dhirj Gir Gosain v. Sreeputty Sahanee ⁽¹⁾ followed.

SECOND appeal from the decision of L. P. Parekh, Judge of the Court of Small Causes at Ahmedabad with appellate powers, reversing the decree of V. M. Mehta, Subordinate Judge of Dhanduka.

The parties to the suit were Chudasama Girasias in the Dhanduka Táluka of the Ahmedabad District. The following is the brief history of the litigations in their family which led to the present suit.

In the year 1889 three sharers of the branch of Bavaji Pochanji and one sharer of the branch of Samatsang Pochanji applied to the Tálukdári Settlement Officer for partition of their joint tálukdári lands against three other sharers of the branch of Samatsang Pochanji. The Tálukdári Settlement Officer, Mr. Younghusband, instituted proceedings and held that the sharers of Bavaji's branch, which was the elder branch, were entitled to $1\frac{1}{2}$ shares and those of Samatsang's branch to 1 share according to the custom of *Motap*. In pursuance of the said decision the shares of different parties were determined and a notification to that effect was issued on the 27th July 1892.

While Mr. Younghusband's order regarding partition was being carried out, the sharers belonging to Samatsang's branch filed a suit, No. 2 of 1893, before Mr. Quin, who had succeeded Mr. Younghusband as the Tálukdári Settlement Officer, against the sharers of Bavaji's branch and prayed that the order of Mr. Younghusband should be set aside as being illegal and a

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⁽¹⁾ (1880) 5 Cal. 332 at p. 338.

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fresh decree ordering partition by equal shares should be passed. Mr. Quin thereupon heard the case and held that the custom of *Motap* was not proved. He therefore ordered partition to be made according to the rules of Hindu Law. Against the said order there were various proceedings, and the High Court finally upheld the order on the 26th January 1897 in second appeal No. 595 of 1896.

The plaintiffs, who were the representatives of Bavaji's branch, thereupon brought the present suit for a declaration that they were entitled to $1\frac{1}{2}$ shares and that the decree in suit No. 2 of 1893 was illegal and not binding upon them. They further prayed for an injunction restraining the defendants from executing the decree passed by Mr. Quin for division by equal shares.

Out of fifty-one defendants, one set of them admitted the plaintiffs' claim on the ground that the descendants of Bavaji, who was the senior representative, were entitled to $1\frac{1}{2}$ shares and the descendants of Samatsang, who was junior, were entitled to one share. The second set admitted the claim and stated that they were not parties to suit No. 2 of 1893 and that the decree therein was fraudulently obtained and they were not bound by it. The third set contended *inter alia* that the shares of the parties were determined in suit No. 2 of 1893, and that as the plaintiff's father (defendant 1 in the present suit) was a party to that suit, the decree therein, which was ultimately confirmed by the High Court on the 26th January, 1897, in second appeal No. 596 of 1896, created the bar of *res judicata* to the present suit.

The Subordinate Judge found that the descendants of Bavaji and Samatsang were entitled to $1\frac{1}{2}$ and 1 shares respectively. But he rejected the claim on the ground of *res judicata*.

On appeal by the plaintiffs, the First Class Subordinate Judge of Ahmedabad with appellate powers confirmed the decree.

The plaintiffs having preferred a second appeal, No. 480 of 1900, the High Court (Jenkins, C. J., and Aston, J.), on the 29th September 1903, reversed the decree and remanded the case for trial on the merits.

On the remand the Judge of the Court of Small Causes with appellate powers held that the plaintiffs were entitled to $1\frac{1}{2}$

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shares and that the decree passed in suit No. 2 of 1893 and the decrees subsequently passed in further proceedings, which had arisen under that decree, were not binding on the plaintiffs. He therefore reversed the decree and ordered the defendants to refrain permanently from executing the said decrees against the plaintiffs.

Defendants 16—41 preferred a second appeal.

Modi (with *Rao Bahadur V. J. Kirtikar*, Government Pleader, and *R. V. Desai*) appeared for appellants 1 and 2 (defendants 17 and 18).

L. A. Shah appeared for respondents 3, 6, 9, 10, 13 and 15 (defendants 2, 5, 12, 13, 15 and 17).

Scott (Advocate General) with *M. N. Mehta* appeared for respondents 1, 2, 4, 5, 7, 8 and 11 (plaintiffs 1 and 2 and defendants 3, 4, 8, 11 and 14).

JENKINS, C. J. :—The plaintiffs have brought this suit to obtain the final decree of a Court of competent jurisdiction declaring them to be entitled to a share of a talukdāri estate.

They allege a custom of *motap*, in accordance with which their ancestor Bavaji obtained a greater share in the family property than his younger brother Samatsang, and the lower Appellate Court has, on remand, held the custom proved. A decree has been passed on the basis of this finding, and from that decree the present appeal has been preferred. It is objected that the custom has not been proved in that the evidence is not clear and unambiguous, and the custom has not been shown to be certain, ancient and invariable.

It cannot be said that the Judge of the lower Appellate Court was not aware of these requisites to the legal proof of a custom, for in the forefront of his judgment he enumerates them and cites the case in which they are stated.

And we hold, notwithstanding the searching criticism to which his judgment has been subjected by Mr. Modi, that there is evidence on the record on which the Subordinate Judge was entitled to hold as he did.

He has held that on the death of Pragji, an ancestor removed by about 9 degrees in the direct line from the present plaintiffs, the family estate descended in accordance with this custom, and there is evidence in support of this. He has further held that

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the families of Bavaji and Samatsang respectively have been proved to have actually enjoyed the family property in shares sanctioned by the custom from 1850 or 1851, and from this long enjoyment he has inferred a division between those two in conformity with it.

In this he was (in our opinion) within his rights as the final Judge of facts, and we hold that no error has been shown which would entitle us to interfere in second appeal.

Moreover, it is to be noted that the Judge of the lower Appellate Court has determined that the long enjoyment should be held to have ripened into a right; so that on this finding of fact also the conclusion as to the shares of the parties can be supported.

The only other question is whether the defendants are bound by the result of the proceedings, which culminated in a decree of this Court passed on the 26th of January 1897. The Judge of the lower Appellate Court has decided this in the negative, and this conclusion is impugned by the appellants.

These proceedings arose out of an application to the Tálukdári Settlement Officer under section 11 of the Gujarát Tálukdárs' Act, 1888.

From his decision an appeal was preferred under section 16 to the District Court, and from that Court's decree there was an appeal to the High Court.

The result of those proceedings was that the custom of *motap* was negatived.

It is contended that this constitutes *res judicata* so far, at any rate, as concerns those of the present litigants who were parties to those proceedings.

We do not agree with this.

The law of *res judicata* is to be found in section 13 of the Civil Procedure Code, and to make its terms applicable it must be shown that the Tálukdári Settlement Officer is a Court of jurisdiction competent to try this suit. But this he clearly is not: he is an administrative officer and not a Court: and by no straining of words can he be described as a Court of jurisdiction competent to try this suit. If need be, this is made even clearer by the terms of section 10 of the Gujarát Tálukdárs' Act.

True it is, those proceedings came up to the High Court, and it has been held such an appeal will lie, though the proceedings originate before an administrative officer in accordance with a machinery prescribed by the Bombay Legislature: *Jamsang v. Goyabhai*⁽¹⁾. But, assuming, as we now must, that they rightly came to this Court, still on the authorities that would not better the plea of *res judicata*. It was said by White, J., in *Toponidhee Dhirj Gir Gosain v. Sreeputty Sahanee*⁽²⁾ that "in considering the competency of a Court for the purpose of deciding upon a question of *res judicata*, we must, I think, look to the powers of the Court in which the suit was instituted, and not to the powers of the Court by which that suit was decided on appeal." Effect was given to this view in *Bharasi Lal Chowdhry v. Sarat Chunder Dass*,⁽³⁾ and it should, we think, be followed by us.

Then how does the case stand apart from the doctrine of *res judicata*? Section 10 of the Act prescribes that every person who has obtained a final decree of a Court of competent jurisdiction declaring him to be entitled to a share of a talukdári estate shall be entitled to have his share divided from the rest of the estate and to hold the same as separate estate. This (in our opinion) applies to a defendant as well as to a plaintiff in whose favour a declaration has been made, and clearly contemplates that the Court should declare not only the existence of the share but also its extent.

No doubt the right assumes that there is an estate to be divided, in other words, an undivided estate; and that condition exists here, for notwithstanding the prior application to the Talukdári Settlement Officer, and the consequent proceedings, it is not suggested that there has been any such partition as is mentioned in section 17, or that the estate has otherwise ceased to be undivided.

We therefore think the lower Appellate Court has rightly decided and that the decree should be confirmed. The appellants must pay the costs of the appeal, two sets of costs being allowed to the respondents, and the costs of the cross-objections must be borne by the respondents by whom they were filed.

G. B. R.

Decree confirmed.

(1) (1891) 16 Bom. 403.

(2) (1880) 5 Cal. 332 at p. 333.

(3) (1895) 23 Cal. 415.

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APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

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September 20.

BHANAJI RAOJI KHOJI, PLAINTIFF, *vs.* JOSEPH DE BRITO,
DEFENDANT.*

Civil Procedure Code (Act XIV of 1882), Chapter 46—Reference—Reasonable doubt—Point clearly decided by the rulings of the High Court of Presidency.

A reference under Chapter 46 of the Civil Procedure Code (Act XIV of 1882) can only be made when the Judge of the Court entertains a reasonable doubt.

A Judge cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court of his Presidency unless the authority of the decision can be questioned by virtue of anything said or decided in the Privy Council.

REFERENCE from R. S. Tipnis, District Judge of Thána, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff sued to recover from the defendant Rs. 100 for principal and Rs. 46-8-0 for interest, in all Rs. 146-8-0, due upon a promissory note dated the 22nd August 1902.

The defendant replied that he was a minor at the date of the execution of the promissory note, that the plaintiff got him to affix his signature on a blank paper, that he received only Rs. 30 as consideration, that the promissory note was void and that the plaintiff got the note written after defendant affixed his signature on a blank paper.

The Assistant Judge who tried the case as the Court of first instance decreed the plaintiff's claim with costs, holding that though the defendant was a minor when he passed the promissory note and therefore the contract was void, still he was estopped from pleading minority by his conduct.

The defendant appealed. As the claim was a Small Cause one, and as there would be no appeal against the decree of the Judge, he submitted the following question under section 617 of the Civil Procedure Code (Act XIV of 1882).

"Whether defendant is estopped from denying his liability under the promissory note in dispute which he executed in favour of plaintiff on the date on

* Civil Reference No. 2 of 1905.

which he (defendant) was a minor? In other words, whether section 115 of the Indian Evidence Act applies to minors?"

My doubt is created by the conflicting rulings on the point as noticed by me in my judgment. I am aware of the ruling in *Naru v. Chima*, I. L. R. 13 Bom. 54; but I have humbly ventured to make this reference as the Bombay High Court's decision is completely dissented from by four Judges of the Calcutta High Court, one of whom is my lord the present learned Chief Justice of the Bombay High Court, and it is not merely a matter of my own view being opposed to the decision of the Bombay High Court.

Following the ruling of my own High Court my opinion on the point is in the affirmative.

In this judgment the Judge observed as follows:—

The wording and the tones of several letters of defendant satisfy me that defendant intentionally made a false representation as to his age in order to induce plaintiff to advance money to him. Not being aware of the minority of the defendant or the falsity of defendant's representation, plaintiff acted upon it. Strictly speaking the case would fall under section 115 of the Evidence Act relating to estoppel had it not been for the circumstance that that section is perhaps not intended to be applied to the case of minors. In *Ganesh Lala v. Bapu*, I. L. R. 21 Bom. 198, Jardine and Ranade, JJ., held that the doctrine of estoppel applies to minors as well as adults. I should have had no hesitation in following the decision of my own High Court in the present case, had it not been the fact that the above ruling is dissented from in *Dhurmo Dass Ghose v. Brahmo Dutt*, I. L. R. 25 Cal. 616, by Jenkins, J., and in the same case when it went before the Appellate Court (*see* I. L. R. 26 Cal. 381) Maclean, C. J., and Prinsep and Ameer Ali, JJ., the Calcutta High Court has held that section 115 of the Evidence Act has no application to contracts by infants and has pointed out that the English decisions relied upon in the Bombay case do not really support the view which Jardine and Ranade, JJ., took on that point.

The Calcutta case went in appeal before the Privy Council (I. L. R., 30 Calcutta 539). In that case their Lordships set at rest the much vexed question whether an infant's contract was void or voidable. Having held that it was void and as the question of estoppel did not arise since the false representation was made to a person who knew it to be false, the decree of the Calcutta High Court was upheld on these grounds without expressing any opinion as to whether the question of estoppel affects minors. In this state of the decisions I am of course bound to follow my own High Court's ruling which is in a way supported by the ruling in *Ram Ratun Singh v. Shew Nandansingh*, I. L. R. 29 Calcutta 126. I entertain, however, a reasonable doubt as to the correctness of my opinion in view of the conflicting rulings mentioned above.

If defendant is estopped under section 115 of the Evidence Act then it is clear that plaintiff is entitled to recover the full amount of the claim due upon the promissory note in question.

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Gadgil (with *K. J. Bilimoria*) appeared for the defendant:—The reference is made in rather wide terms and owing to this circumstance it is covered by the ruling in *Ganesh Lala v. Bapu*.⁽¹⁾ But we submit that that case is clearly distinguishable. The plaintiff in that case was not given relief on the ground of his own fraud. The question to be considered is whether the said ruling is of such an import as to mean that a minor is estopped from pleading minority as a defence to a suit on a promissory note. We contend that the fraud of a minor operates to estop him in equity but not in law, that is, in contractual relations.

[JENKINS, C. J.:—But the reference is not made in that form. The reference as framed cannot lie as the Judge could not have any reasonable doubt.]

According to the ruling in *Naru Koli v. Chima Bhoale*⁽²⁾ the Judge was bound to follow *Ganesh Lala v. Bapu*,⁽³⁾ but we contend that the facts of that case show that it cannot apply to a case like the present.

The Judge's view that a personal decree can be passed against a minor is not correct. Further the Judge has made out a new case for the plaintiff. The contention as to estoppel on the ground of fraud was nowhere set forth by the plaintiff.

D. M. Gupte appeared for the plaintiff:—The Judge was bound to follow *Ganesh Lala v. Bapu*⁽³⁾ and the reference cannot lie. As the reference was made at the instance of the defendant, he should be saddled with our costs.

Gadgil, in reply:—Under section 620 of the Civil Procedure Code, the costs will be costs in the case.

JENKINS, C. J.:—A reference under Chapter 46 of the Civil Procedure Code can only be made when the Judge of the Court entertains a reasonable doubt.

The Judge of the lower Court cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court of his Presidency, unless the authority of the deci-

(1) (1895) 21 Bom. 198.

(2) (1888) 13 Bom. 54.

(3) (1895) 21 Bom. 198.

sion can be questioned by virtue of anything said or decided in the Privy Council.

We therefore think that the learned Judge was not entitled to make the reference in this case as the point on which he professes to entertain a reasonable doubt is completely covered by *Ganesh Lala v. Bapu*.⁽¹⁾

Costs will be costs in the case.

Order accordingly.

G. B. R.

(1) (1895) 21 Bom. 198.

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APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Aston.*

BHAU BIN ABAJI GURAV (ORIGINAL DEFENDANT), APPELLANT, v.
RAGHUNATH KRISHNAGURAV AND ANOTHER (ORIGINAL PLAINTIFFS),
RESPONDENTS.*

*Stridhan—Saudayik—Bequest by will—Power of disposal subject to
husband's consent—Gurav Service—Vritti.*

Saudayik Stridhan is that which is obtained by a married woman or by a virgin in the house of her husband or of her father, from her brother or parents.

Except in the kind known as Saudayik, a woman's power of disposal over her Stridhan is during coverture subject to her husband's consent, and without such consent she cannot bequeath it by will when she is survived by her husband, who is not shown ever to have consented to the will.

SECOND appeal from the decision of J. J. Heaton, District Judge of Násik, amending the decree of P. J. Taleyarkhan, Joint Subordinate Judge.

The right to render Gurav Vritti (office) for 2½ months each year in certain temples at Násik belonged to one Gangabai who had inherited it from her deceased husband. Before her death she made a gift of the right to her daughter and her granddaughter Krishnabai, wife of the defendant. After Gangabai's death her daughter died and Krishnabai was the sole survivor. Krishnabai made a will on the 9th and died on the 26th

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June 1899. Under the will she bequeathed the right to one Raghunath, who managed her affairs during her lifetime, and her two maternal aunts Avdi and Parvati. The devisees applied for probate of the will and the probate was granted to only two of them, namely, Raghunath and Avdi, Parvati having died in the meanwhile. The defendant, however, forcibly prevented them from officiating as Gurav and himself officiated and took the emoluments of the Vritti. Raghunath and Avdi, therefore, brought the present suit to (1) obtain a declaration of their right to perform the Gurav service, (2) for possession of Krishnabai's turn of service from the defendant, and (3) for an injunction to restrain the defendant from obstructing them from officiating and receiving the income.

The defendant pleaded that the will set up by the plaintiffs was not genuine, that Krishnabai had no power to bequeath the right of service, that he was not affected by the grant of the probate, that Krishnabai was not empowered to alienate the right of service, and that he had become owner of the right by adverse possession extending over more than twelve years.

The Subordinate Judge found that the will relied on by the plaintiffs was proved, that Krishnabai had power to make it, and that the defendant had not acquired title to the Gurav Vritti by adverse possession. He, therefore, passed a decree allowing the claim.

On appeal by the defendant the Judge confirmed the decree with a slight amendment as to the plaintiffs' rights *inter se*.

The defendant preferred a second appeal.

M. V. Bhat for the appellant (defendant) :—The first question is whether in the Gurav Vritti Krishnabai took an absolute estate transmissible to her heirs. We submit that she took only a restricted estate and had no right to devise it according to the rulings of the Privy Council in *Sheo Shankar Lal v. Devi Sakai*⁽¹⁾, and *Sheo Partab Bahadur Singh v. The Allahabad Bank*⁽²⁾. In the first case the question was as to the descent of property inherited from a female and in the second the question was whether the property inherited from a female was the absolute

(1) (1903) 25 All. 468.

(2) (1903) 25 All. 476.

property of the last holder so that she could alienate it beyond her lifetime. The solution of this question depends upon the consideration of another question whether the literal interpretation of the text of the Mitakshara defining stridhan should be accepted. That interpretation apparently makes all property inherited by a woman her stridhan in the strict sense of the term with all the incidents of such property including the free power of alienation. The Privy Council answer the question by holding that the literal interpretation of the Mitakshara should not be accepted as a correct exposition of the primitive text of Yajnyavalkya, which restricts stridhan to particular kinds of gifts only. Mr. Mayne has clearly pointed out that the interpretation put by Vijnaneshvar on the word "Adi" so as to include all kinds of property howsoever acquired did not mean that females got absolute estates. The author must be taken to have meant simply that partition, inheritance and such other modes of acquiring property which were open to males were also open to females. Apparently the Privy Council accepted this argument, Mayne's Hindu Law, 6th edition, sections 607—610. The ruling in *Sheo Partab Bahadur Singh v. The Allahabad Bank*⁽¹⁾ simply followed the current of the Privy Council rulings on the point. The first Privy Council case on the point is *Bhugwandeem Doobey v. Myna Bace*⁽²⁾. That decision referred to the texts of the Mayukha, Katyayana and Narad. It was, therefore, not a decision confined only to the Benares School. The next case is *Chotay Lall v. Chunno Lall*⁽³⁾. It treated the opinion of West, J., on the text of the Mitakshara relating to stridhan in *Vijiarangam et al v. Lakshuman et al*⁽⁴⁾ as *obiter dictum* opposed to the decisions of the Privy Council. This is clearly pointed out by Jardine, J., in *Gadadhar Bhat v. Chandrabhagabai*⁽⁵⁾. The next case is *Mutta Vaduganadha Tevar v. Dorasinga Tevar*,⁽⁶⁾ which was followed in *Dalpat Narotam v. Bhagvan Khushal*.⁽⁷⁾

As to Bombay cases:—There are three classes of cases. Those which are governed solely by the Mitakshara, those which are

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(1) (1903) 25 All. 476.

(4) (1871) 8 Bom. H. C. R. (O. C. J.) 244.

(2) (1867) 11 Moo. I. A. 487.

(5) (1892) 17 Bom. 690 at p. 700.

(3) (1878) L. R. 6 I. A. 15.

(6) (1881) L. R. 8 I. A. 99.

(7) (1885) 9 Bom. 301.

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governed solely by the Mayukha, and those which are governed by these two read together. The Bombay decisions begin with *Pranjivandas Tulsidas et al v. Devkuvarbai et al*⁽¹⁾ and they lay down that reading the Mitakshara by the light of the Mayukha, it must be held that females born in the family take an absolute estate and those entering the family by marriage take a restricted estate. The decision of the Full Bench in *Bhagirthibai v. Kahnujirav*⁽²⁾ has reviewed all the cases on the point. The examination of the cases shows that the text which is the foundation of the absolute and several estate given to a daughter in Bombay is placitum 10, Chapter IV, Section VIII, Vyavaharmayukha; Stoke's Hindu Law, page 86. This consists of a quotation from Manu, Chapter IX, verse 130. This verse deals with the status of an appointed daughter under old Smriti Law. Nilkantha adds to it by way of comment that "if there be more daughters than one they are to divide (the estate) and take (each a share)." But the text speaks absolutely nothing as to what kind of estate the daughter is to take, nor does it say anything as to her power of disposition over such inherited property. The text points out that the question there discussed is whether a daughter should be recognized as an heir after the widow, and Nilkanth adds that she is to be recognized as heir after the widow because she is just like a son according to Manu. The text does not warrant the absolute and several estate given by the Bombay High Court to females born in the family. The Full Bench case *Bhagirthibai v. Kahnujirav*⁽²⁾ was the case of a female taking from a male, while in the present case we are concerned with a female taking from a female. The placitum from the Vyavaharmayukha deals with the inheritance taken by a daughter from the father and it does not relate to property inherited by a female from a female. The nature and extent of the estate so taken is to be determined by reference to the texts relating to Stridhan in the Mitakshara and the Mayukha. If those texts be examined the result is this:—The text of the Mitakshara adds to Yajnyavalkya's description of six kinds of Stridhan the word "Adi," and thereby includes in Stridhan all kinds of property howsoever

(1) (1859) 1 Bom. H. C. R. 130.

(2) (1886) 11 Bom. 285.

acquired by females. But the Privy Council have laid down that this is an unwarranted interference with the Smriti law by Vijnaneshvar, therefore, his addition should be disregarded. Besides this the Mitakshara is absolutely silent on the point of a woman's power of disposition. We, therefore, submit that there being no express text of the Mitakshara which deals with the subject of the estate taken by a daughter, the question should be decided on general principles which govern female property and succession. The interpretation by the Privy Council of the original text of Yajnyavalkya should be accepted and not the unwarranted addition of Vijnaneshvar.

The rulings of the Bombay High Court lay down that the Mitakshara should be interpreted by the light of the Mayukha and when this is done females born in the family get an absolute estate. As to this we submit that in cases solely governed by the Mitakshara reference is to be made to the Mayukha only when the Mitakshara is doubtful, *Lallubhai v. Mankurabai*⁽¹⁾, *Balkrishna Bapuji v. Lakshman Dinkar*⁽²⁾, *Jankibai v. Sundra*⁽³⁾. The Privy Council have laid down how the primitive text of Yajnyavalkya is to be interpreted. No doubt was, therefore, left on the point after the decisions of the Privy Council. We cannot, therefore, resort to the Mayukha. But even the Mayukha does not give absolute estate to females born in the family, placitum 24. On the contrary there is a passage in the Mayukha, the correct translation of which shows, that a woman shall not expend even her own wealth without the assent of her husband, Mandlik's Translation of the Vyavaharmayukha, page 93. Therefore Krishnabai did not take an absolute estate.

Our next point is that Krishnabai, being a married woman, had no power to make a bequest without her husband's consent, see Mandlik, page 93. Dr. Jolly in his work on Hindu Law, page 253, after discussing the texts of the Mitakshara and the Mayukha deduces that a woman may not alienate any part of her stridhan, except Saudayik property, without her husband's assent, see also Dr. Banerjee's Lectures on Marriage and Law of Stridhan, page 299. The general spirit of Hindu Law is not to

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(1) (1876) 2 Bom. 388 at p. 445.

(2) (1890) 14 Bom. 605.

(3) (1890) 14 Bom. 612 at pp. 623, 624.

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allow women independence as regards disposition of property. In the case of female property ownership means right of possession and right of enjoyment. The third element of ownership, namely, the power of disposition, is not recognized by Hindu Lawyers. The right of absolute disposal did not enter into Vijnyaneshvar's conception of the essentials of ownership, *Vijiarangam et al v. Lakshuman et al*⁽¹⁾. Even the decision of the Full Bench in *Bhagirthibai v. Kahnajirav*⁽²⁾ confirms this view, see also West and Bühler (3rd Edn.), pages 318-320; Mandlik's Hindu Law, pages 365-367; Dr. Jolly's Hindu Law, pages 251, 252; Sarvadhikari's Hindu Law, pages 271-9; Manu, Chapter V, verses 147-149, Chapter IX, verses 1 and 2; Narad, Sacred Books of the East, page 49.

Our third point is that the bequest in favour of Raghunath, a stranger, is invalid. The ruling in *Rajaram v. Ganesh*⁽³⁾ clearly points out the distinction between the Vritti of a Pujari in virtue of which certain religious services are performed on behalf of pilgrims to a Tirth (holy place) who pay fees to the holders of the Vritti for performance of those services, and the right of hereditary service in a temple, and the alienation to strangers and alienation to members of the family. The general rule laid down by the text law is that religious offices are not alienable. The only exception is the alienation to a member in the line of succession, *Sitarambhat v. Sitaram Ganesh*⁽⁴⁾, *Mancharam v. Pranshankar*⁽⁵⁾, *Kuppa v. Dorasami*⁽⁶⁾.

The plaintiffs can succeed only on showing that there is a general custom and practice recognizing alienation of the Vritti in dispute and of the service in the temple in favour of strangers. They have not done so. Besides such custom would militate against the Hindu text law. The effect, however, of recognizing such custom would be to frustrate the very object of the institution of the office which involves the performance of religious service.

D. A. Khare for the respondents (plaintiffs):—The two recent Privy Council rulings, no doubt, curtail the absolute power of

(1) (1871) 8 Bom. H. C. R. (O. C. J.) 244 (3) (1898) 23 Bom. 131.

at p. 264.

(4) (1899) 6 Bom. H. C. R. (A. C. J.) 250.

(2) (1886) 111 Bom. 285 at p. 300.

(5) (1882) 6 Bom. 298.

(6) (1882) 6 Mad. 76.

females over their stridhan property, but they are in conflict with the current of decisions of this Court and they do not affect those parts of Bombay which are governed by the Mayukha, which applies to all districts in this Presidency, *Sheo Partab Bahadur Singh v. The Allahabad Bank*⁽¹⁾, *Gadadhar Bhat v. Chandrabhagabai*⁽²⁾.

As regards the devolution of stridhan property the text of the Mitakshara lays down that it goes to the woman's kinsmen. If she possessed no property then it cannot go to her kinsmen. This circumstance clearly points to the conclusion that Vijnaneshvar was of opinion that females had absolute right over their stridhan property, see Mayne's Hindu Law (6th Edn.), sections 607-610; Stoke's Hindu Law, page 460; *Bhugwandeon Doobey v. Myna Bacc*⁽³⁾; Golapchandra Sarkar's Hindu Law, page 291.

Yajnyavalkya gives no rules of inheritance. We must therefore accept the interpretation put upon his words by the commentators who are themselves authorities on the point, Dr. Banerjee's Lectures on Marriage and Law of Stridhan, page 292.

[JENKINS, C. J.:—The question is how far a woman has power to devise non-technical stridhan during her husband's lifetime?]

We rely on *Gandhi Maganlal v. Bai Jadal*⁽⁴⁾ in support of our contention that the estate taken by Krishnabai was absolute and not restricted.

As to the point whether she could will away in favour of a stranger, the Judge has referred to the evidence in the case which shows that the alienation of such Vrittis to a stranger is valid.

JENKINS, C. J.:—The plaintiffs sue for a declaration of their right to perform Gurav service in certain temples, for possession, and for an injunction, alleging forcible prevention by the defendant.

The right of service, or Vritti, became vested in Gangabai as widow and heiress of her deceased husband, and shortly before

(1) (1903) 25 All. 476 at p. 492.

(3) (1867) 11 M. I. A. 487 at pp. 509, 511.

(2) (1892) 17 Bom. 690 at p. 699.

(4) (1899) 24 Bom. 192.

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her death she purported to make a gift thereof to her daughter and her grand-daughter Krishnabai.

Gangabai died, and then her daughter. Krishnabai survived them.

The case has been argued before us on the assumption (1) that Gangabai's only child was this daughter, (2) that Krishnabai was her only grand-child, and (3) that the Vritti vested in Krishnabai.

As Gangabai had only a widow's interest her gift could not pass a larger estate, and so on her death her gift was exhausted. The Vritti, therefore, devolved by inheritance on Krishnabai. She is now dead. She purported to bequeath it by will to the plaintiffs, but the validity of her bequest is contested by the defendant, her husband.

The lower Appellate Court, however, decreed the plaintiffs' claim, and so the defendant has preferred this appeal.

Three points have been urged before us :—

(1) That Krishnabai did not take an absolute interest in the Vritti; (2) that if she did, still she had no power of bequest without her husband's consent; and (3) that a Vritti cannot be bequeathed, at any rate, to a stranger.

The first point rests on the contention that the Bombay view as to the absolute character of a daughter's Stridhan is annulled by the recent decisions of the Privy Council in *Sheo Shankar Lal v. Debi Sahai*⁽¹⁾ and *Sheo Partab Bahadur Singh v. The Allahabad Bank*.⁽²⁾

The effect of these decisions runs counter to the law of Stridhan as understood in Bombay and to decisions which date back at least as far as 1859. In *Pranjivandas Tulsidas v. Devkuvarbai*⁽³⁾ it was determined by the Supreme Court that a daughter took an absolute interest, and though the case apparently arose in the Island of Bombay, still the decision was expressly based on a reading of Manu, the Mitākshāra, and the Mayukha, and was in accordance with the opinions of the shāstris both of the Sadar Adalat of Bombay and of Poona.

In *Vinayak Anandray v. Lakshmibai*⁽⁴⁾ it was said: "In Devkuvarbai's case⁽³⁾ this Court, in 1859, after lengthened con-

(1) (1903) 25 All. 468.

(2) (1903) 25 All. 476.

(3) (1859) 1 Bom. H. C. R. 130.

(4) (1859) 1 Bom. H. C. R. 117 at p. 124.

sideration of all the accessible authorities, and after consulting the shāstris both in Poona and in the Sadar Adalat of Bombay, held that daughters, on this side of India taking by inheritance, take the estate absolutely In the case of Devkuvarbai, each shāstri rested his opinion as to the inheritability of the daughters on this same passage of the Mayukha, referring to it as a work of high and generally received authority, not only in Gujarāt, but in Bombay and the Dekhan, that is to say, over the larger and more important portion of this Presidency. Of the general authority of the Mitākshāra on this side of India, there cannot be, and in fact, never has been, any doubt, and on this point the Mitākshāra is not less clear and explicit than the treatise already cited." It is true the question that directly arose in that case was as to the nature of the estate inherited by a sister; but it was decided by reference to the character of a daughter's estate: the reasoning was "the daughters of the man himself take absolutely, and so, therefore, do the sisters."

That the sisters took absolutely was determined on appeal by the Privy Council—*Vinayak Anandray v. [Lakshmbai]*⁽¹⁾—and this result was apparently reached by the same train of thought.

This view has ever since been followed, and it has now come to be recognized as the rule in Bombay that female heirs, except those who come into the family of the *propositus* by marriage, take absolute interests.

To throw a doubt on this rule might be productive of great mischief; and both the decisions in I. L. R. 25 All. make a saving reservation in favour of those parts of Bombay where the Mayukha is accepted or governs. And though in Nāsik the Mayukha is not commonly regarded as the paramount authority, still it is not without its distinct influence. Our opinion on another point of the case makes it unnecessary for us to decide the point, and we, therefore, refrain from so deciding; but we think it right to express the view that the arguments advanced by Mr. Bhat with much ability and after much research have failed to convince us that the decisions in I. L. R. 25 All. involve in Bombay the change in the law for which he contends. We

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(1) (1859) 1 Bom. H. C. R. p. 129.

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will, therefore, deal with the case on the assumption that no such change has taken place.

The point on which the appellant must (in our opinion) succeed is Krishnabai's intestability in the absence of her husband's consent.

In the Mayukha (Chapter IV, section X, page 93 of Mr. Mandlik's edition) it is said :—" As for the text—' A wife, a son, and a slave are all incapable of property. Whatever they earn, belongs to him to whom they belong,' that too has reference to wealth acquired by mechanical arts and the like. It is also proper [to interpret the text as showing] the absence of absolute dominion even in the *adhivedanika* or other [species of *stridhan*]. Hence, says Manu [Ch. IX, v. 199] :—" A woman should never make [any] expenditure out of the family [property] belonging to several or even [out of] her own wealth without the assent of her husband.' In a certain [kind of] property, Katyana declares [their] absolute dominion. 'That which is obtained by a married woman, or by a virgin in the house of her husband, or of her father, from her brother, or her parents, is termed *saudayika*. The independence of women who have received the *saudayika* wealth is desirable [in regard to it], for it was given [by their kindred] for their maintenance out of affection. The power of women over *saudayika* at all times is celebrated both in respect of gift and sale, according to their pleasure, even in [the case of] immoveables.' "

This passage clearly indicates that, except as to the kind known as *Saudayika*, a woman's power of disposal over her *Stridhan* is during coverture subject to her husband's consent.

This view is not peculiar to Nilakantha, but was shared by Mitra Misra, who in the *Viramitrodaya* (Chapter V, Part I, paragraph 5, Sarkar on *Viramitrodaya*, page 224) says :—" In the disposal of woman's property, however, females have not independence without the permission of their husband." He then proceeds to cite the text of Katyana which prescribes a different rule as to *Saudayika*.

The *Smriti Chandrika*, Chapter IX, section 2, is to the same effect.

Vijnanesvara is apparantly silent on the point, but in reference to this it is said in *Vijjarangam v. Lakshuman*⁽¹⁾ :—

‘He lays down no rule as to the extent of the woman’s own power over the property. The natural conclusion would seem to be that he considered this already sufficiently provided for as to his immediate subject, inheritance, by other lawyers, and by the analogies to be drawn from his rules as to the estate of a male proprietor. Now in Ch. I, sec. 1, pl. 27, 28, it is laid down that a man is ‘subject to the control of his sons and the rest (of those interested) in regard to the immoveable estate, whether acquired by himself or inherited,’ though he may make a gift or sale of it for the relief of family necessities or for pious purposes. It is clear, therefore, that a right of absolute disposal did not enter into Vijnaneśvara’s conception of the essentials of ownership. He admits (Mitak., Ch. II, sec. 1, pl. 25) the genuineness and the authority of the text of Narada, which, with so many others, proclaims the dependence of women, which he says does not disqualify them for proprietorship. He allows a husband, as we have seen, in some cases to dispose of his wife’s property. The inference to be gathered from these passages is strengthened if we look into his chief authorities. Manu allows women no independence. The verse denying it occurs in Yajñavalkya also (Ch. I). Katyayana, so frequently quoted in the Mitākshāra, says that the widow is to enjoy the estate frugally till she die, and after her the heirs (Colebrooke’s Digest, Bk. V, T. 477), consistently with that passage of the Mahābhārata (T. 402) which limits the widow to simple enjoyment. Jagannatha (T. 402), referring to texts 476 and 477, observes that as a woman is not allowed to make away with immoveable property given to her by her husband, much less can she dispose at her will of such property inherited from him. Even Brhaspati, who, as we have seen, insists emphatically on a widow’s right of inheritance, is equally emphatic in restraining her power of dealing with it (Vyav. M., Ch. IV, sec. 8, pl. 3). His somewhat ambiguous expression cannot at any rate mean less than this. It seems a reasonable inference from these and other authorities that, as to immoveable

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(1) (1871) 8 Bom. H. C. R. (O. C. J.) 244 at p. 224.

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property at any rate—and with immoveable property, according to the Hindu law, is classed every kind of property producing a periodical income—the woman's ownership is subject to the control of her husband, and of the other persons interested in the preservation of the estate, and that it cannot be needlessly dissipated at her mere caprice."

It is to be noted that Vijnaneśvara cites the text on which Nilakantha relies, and apparently with approval (see Mitākshāra, Chapter I, section 1, pl. 20 and 25).

In West and Bühler's Hindu Law⁽¹⁾ it is said:—"Her full ownership of her Stridhan is subject to the qualification that her husband may dispose of it in case of distress, and that her own power to alienate it is subject to control by him with the exception of the so-called Saudayakam, the gifts of affectionate kinsmen."

This restriction, as far as we can learn, agrees with the sense of the community.

If, as we hold, a woman cannot alien her Stridhan, other than Saudayika, during coverture without her husband's consent, then it follows that her testamentary power of disposition is subject to the like restriction where, as in this case, she is survived by her husband, who is not shown ever to have assented to the will (see Succession Act, section 46, Expl. 1).

The Vritti in this case does not come within the exemption in favour of Saudayika; no consent by the defendant has been proved; therefore (in our opinion) the plaintiffs' title has not been established.

The decree, therefore, of the District Court must be reversed, and the suit dismissed with costs throughout.

Decree reversed and suit dismissed.

G. B. R.

(1) 3rd Edn., p. 92.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

GIRJASHANKAR NARSIRAM (ORIGINAL PLAINTIFF), APPELLANT, v.

GOPALJI GULABBHAI (ORIGINAL DEFENDANT), RESPONDENT.*

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October 13.

Judicial Officers' Protection Act (XVIII of 1850)—Civil Procedure Code (Act XIV of 1882), section 199—Suit against a Magistrate to recover damages—Judgment written by a Judge after his transfer—Proceedings before a Magistrate for arrears of Municipal revenue—Jurisdiction—Protection afforded to judicial officers—Public Policy—Judicial officers on tour.

An objection having been raised to the legality of a judgment on the ground that the Judge wrote it after he had been transferred,

Held, that section 199 of the Civil Procedure Code (Act XIV of 1882) furnishes a complete answer.

To secure protection under the Judicial Officers' Protection Act (XVIII of 1850) the defendant must show,

1st. That the act complained of was done, or ordered by him in the discharge of his judicial duty; and

2nd. That it was within the limits of his jurisdiction, or if not within those limits, that he, at the time, in good faith believed himself to have jurisdiction to do or order the acts complained of.

In a suit against a Magistrate to recover damages for injury to the plaintiff on account of the highly arbitrary, spiteful and illegal conduct of the defendant—the conduct being in the course of proceedings instituted by a Municipality against the plaintiff before the defendant as Magistrate for the recovery of arrears of house-tax—the plaintiff contended that the defendant had no jurisdiction to entertain the proceedings because the arrears were paid before the proceedings were commenced,

Held, that the case was one which the Magistrate was competent to entertain and none the less because in the result it might appear that there was nothing due. Jurisdiction for the purpose in hand rested, not on the proof adduced in support of the charge, but on the nature of the charge actually made.

The protection afforded to judicial officers rests on public policy. And although thereby a malicious Judge or Magistrate may gain a protection designed not for him, but in the public interest, it does not follow that he can exercise his malice with impunity. His conduct can be investigated elsewhere and due punishment awarded.

Judicial officers, whose official movements may leave them open to the charge that they wilfully compel parties who appear before them to follow the movements of their camp, should strive to exercise their powers with such consideration for such parties as will secure them from any imputation of misconduct in this respect.

* Appeal No. 111 of 1904.

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APPEAL from the decision of Thakurdas Mathuradas, Assistant Judge of Broach with full powers, in original suit No. 1 of 1901.

The plaintiff sued to recover Rs. 999 as damages for injury on account of the highly arbitrary, spiteful and illegal conduct of the defendant in his capacity as Magistrate of Jambusar, alleging that the Managing Committee of the Jambusar Municipality instituted proceedings against the plaintiff in the defendant's Court for the recovery of the arrears of house-tax, that the defendant was disqualified from taking cognizance of the proceedings and had no jurisdiction to entertain them on the grounds that (1) he was a member of the managing committee of the Municipality, (2) the proceedings were unauthorizedly instituted inasmuch as they were commenced under a resolution of the managing committee and not of the Municipality and (3) the arrears were paid before the commencement of the proceedings, that the defendant had notice of the payment before the proceedings commenced and that notwithstanding the notice the defendant maliciously, without reasonable and probable cause and with an intention to injure the plaintiff in reputation and property, issued process against him under the Criminal Procedure Code and with a view to harass the plaintiff compelled him to follow the movements of the defendant's camp from place to place.

The defendant denied the truth of the various allegations made against him and contended that they were intentionally got up and false, that the managing committee had power under the laws and rules in force to lay information before a Magistrate for the recovery of the arrears of house-tax against the defaulters, that the defendant had therefore jurisdiction to proceed with the complaint, that none of the steps taken against the plaintiff was malicious or against good faith or conscience and everything was done in accordance with law, that under the Judicial Officers' Protection Act (XVIII of 1850) the plaintiff was debarred from bringing the suit and the Court had no jurisdiction to entertain it, that owing to enormous work on hand the defendant had to move from one place to another in the discharge of his duty as revenue officer and that the plaintiff had not in any way suffered in reputation and property.

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The Assistant Judge found that the defendant was protected by the Judicial Officers' Protection Act (XVIII of 1850), that none of the defendant's acts was proved to have been done maliciously and without sufficient cause, that the defendant's acts were not proved to be illegal and without jurisdiction, that the Managing Committee of the Jambusar Municipality had power to sanction prosecution for non-payment of house-tax, that the burden of proof with respect to want of power was on the plaintiff, that the house-tax was paid before the complaint was instituted, that the defendant had no knowledge of the payment, that the plaintiff had not proved any loss or injury suffered by him owing to the defendant's acts and that the plaintiff was not entitled to the relief sought. He, therefore, dismissed the suit.

The Assistant Judge, Thakurdas Mathuradas, of Broach ceased to officiate as Assistant Judge of that place in March 1904 owing to his transfer to Surat as Judge of the Court of Small Causes. He wrote the judgment in the case on the 26th June 1904 and it was pronounced in Court by his successor in office, H. S. Phadnis, on the 14th July 1904.

The plaintiff appealed.

G. S. Rao for the appellant (plaintiff).

Scott (Advocate General) with *G. K. Parekh* for the respondent (defendant).

JENKINS, C. J. —The plaintiff by this suit prays "that the Court do award him Rs. 999 as damages for injury to the plaintiff on account of the highly arbitrary, spiteful and illegal conduct of the defendant."

The conduct was in the course of proceedings instituted against the plaintiff before the defendant, a Magistrate at Jambusar, for the recovery of arrears of house-tax.

The suit has been dismissed by the District Court of Broach on the ground that the defendant is protected by Act XVIII of 1850.

The plaintiff has appealed. To his first objection that the judgment was illegal, inasmuch as it was written by Mr. Mathuradas after he had been transferred from Broach, a complete answer is furnished by section 199 of the Code of Civil Procedure.

Then how far does Act XVIII of 1850 afford an answer to the plaintiff's claim?

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To secure the protection of the Act the defendant must show :—

1st. That the act complained of was done, or ordered by him in the discharge of his judicial duty ; and

2nd. That it was within the limits of his jurisdiction, or if not within those limits, that he, at the time, in good faith believed himself to have jurisdiction to do or order the acts complained of.

That the acts complained of were done by the defendant in the discharge of his judicial duty, is clear, so we must see whether he had jurisdiction.

It is contended by the plaintiff that he had not : and for this purpose it is urged (a) that the defendant was disqualified by his membership of the managing committee from trying the case, (b) that the proceedings were unauthorizedly instituted, and (c) that the arrears were paid before the proceedings were commenced.

The imputed disqualification rests on the allegation that the defendant, as a member of the managing committee, sanctioned the prosecution.

Membership alone would be no disqualification (see section 556 of the Criminal Procedure Code), and we hold as a fact that the defendant did not take any part in promoting the prosecution, for we agree with the Judge of the first Court that the evidence shows the defendant was absent when the prosecution was sanctioned.

In support of his contention that the proceedings were unauthorized the plaintiff's argument is that they could only be initiated upon information laid by order of the Municipality : that in this case there was no such order : and that therefore the proceedings and the acts done or ordered therein were not within the limits of the defendant's jurisdiction.

But proceedings like the present have been held to be a prosecution for an offence under section 82 of the Act : *In Re Karunashanker* ⁽¹⁾ and *Municipality of Ahmedabad v. Jumna Punja* ⁽²⁾ ; and under the Municipality's rules the managing

(1) (1888) Cri. Bul. 86 of 1888 : Ratanlal's Criminal Cases, r. 420.

(2) (1891) 17 Bom. 731.

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committee shall exercise and perform all the duties and powers conferred and imposed on the Municipality by section 82 and deal with all matters referred to in that section. So this argument fails.

Next it is urged that there was a lack of authority in so much as the provision in Rule 49 was not observed. But the two members present, when the proceedings were sanctioned, constituted a majority of the members of the committee and it is clear they both gave the consent required by that rule.

Then it is said there was no compliance with Rule 13 in Appendix A; but having regard to the terms of Rule 2, it is clear in the circumstances of the case that this objection is of no avail.

The last argument is that there was no jurisdiction because the arrears were paid before the proceedings were commenced.

But this proceeds on a misapprehension as to the meaning of jurisdiction in this connection.

The case was one which the Magistrate was competent to entertain, and none the less because in the result it might appear that there was nothing due. Jurisdiction for the purpose in hand rests, not on the proof adduced in support of the charge, but on the nature of the charge actually made.

We therefore hold that the acts complained of were within the jurisdiction of the Magistrate, and hence it follows that the defendant is not liable to be sued for the same.

The protection afforded to judicial officers rests on public policy. And though thereby a malicious Judge or Magistrate may gain a protection designed not for him, but in the public interest, it happily does not follow that he can exercise his malice with impunity. His conduct can be investigated elsewhere and due punishment awarded.

We purposely refrain from discussing further the charges made against this defendant, as they appear to us to call for further inquiry. But we desire to comment on one matter of which complaint has been made: it is said that the Magistrate wilfully compelled the defendant to follow the movements of his camp.

It is the kind of complaint one often hears, and from its frequency there is reason to apprehend that it is sometimes not

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without foundation of truth. Appearances may no doubt create in this respect a wrong impression, but where there is real ground for the complaint, it discloses a most discreditable abuse of power. We earnestly hope that those judicial officers whose official movements may leave them open to this charge, will strive to exercise their powers with such consideration for those who appear before them as will secure them from any imputation of misconduct in this respect. The decree must be confirmed with costs.

Decree confirmed.

G. B. R.

PRIVY COUNCIL.

MUNICIPAL OFFICER, ADEN (DEFENDANT), v. ISMAIL HAJEE
ALLANA AND OTHERS (PLAINTIFFS).

[On appeal from the High Court of Judicature at Bombay.]

P. C.*
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November
17, 23

Transfer of suit—Civil cases—Power of High Court to remove suit from Court of Political Resident at Aden—Letters Patent of High Court, 1865, clause 13—Superintendence of High Court—Charter Act (24 and 25 Vict., c. 104), section 15—Aden Courts' Act (II of 1864).

The Civil Court of the Political Resident at Aden, as constituted by the Aden Courts' Act (II of 1864), is subject to the superintendence of the High Court at Bombay within the meaning of clause 13 of the amended Letters Patent, 1865; and the High Court has power to remove a suit from that Court to itself for trial and determination.

APPEAL from a judgment and order (July 7th, 1903) of the High Court at Bombay by which the respondents' suit was transferred from the Court of Political Resident at Aden for trial by the High Court in its Extraordinary Original Civil Jurisdiction.

The order was made under clause 13 of the amended Letters Patent of the High Court dated 28th December 1865, and the only question on this appeal was whether the High Court had power to make such an order.

* *Present*:—Lord Macnaghten, Sir Ford North, Sir Andrew Scoble, and Sir Arthur Wilson.

The facts relating to the application for transfer which was made by the plaintiffs, now respondents, and the judgments of the High Court (CANDY, acting C. J., and CHANDAVARKAR, J.) allowing the application are reported in I. L. R. 27 Bom. 575.

On this appeal.

Cohen, K. C., and *A. Phillips* for the appellant contended that the High Court had no jurisdiction to make an order for the removal of the suit to itself for trial, the Court of the Political Resident at Aden not being subject to the superintendence of the High Court within the meaning of clause 13 of the Letters Patent, 1865, or of section 15 of the Charter Act (24 and 25 Vict., c. 104). The power of superintendence of the High Court under the Aden Courts' Act (II of 1864) was restricted to the powers contained in that Act which were limited and did not extend to "superintendence" within the meaning of either of the above sections. To have superintendence over another Court, under section 15 of the Charter Act, the High Court must, it was submitted, have appellate jurisdiction over it: for that section only gave superintendence to the High Court over Courts which were subject to its appellate jurisdiction: and it must be read with clause 13 of the Letters Patent which gave the High Court power to remove a suit for trial by itself only from a Court subject to its superintendence. But under Act II of 1864 the High Court had no appellate jurisdiction over the Court of the Political Resident at Aden; for no appeal lay from the latter Court to the High Court (see section 8 of the Act). To give the High Court power to make such an order as was now under appeal, clause 13 should have "appellate jurisdiction" imported into it as a condition for the High Court's exercise of the power of removal of the suit to itself for trial. No power of transfer of a suit was given to the High Court under Act II of 1864 although other provisions of section 15 of the Charter Act were introduced into it: the presumption was, therefore, that the power to transfer a suit was intentionally omitted. The power of superintendence of the High Court over the Court of the Political Resident at Aden was merely ministerial and not judicial. In a similar way ministerial jurisdiction of the High Court at Calcutta was allowed over the Court at Moulmein: see

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In the matter of John Thomson⁽¹⁾. Reference was made to the Scheduled Districts Act (XIV of 1874); and it was submitted that the order of the High Court should be set aside.

Herbert Birdwood for the respondent was not heard.

28th November 1905:—The judgment containing the reasons for their Lordships' report was delivered by

LORD MACNAGHTEN:—At the conclusion of the arguments in this case their Lordships intimated that they would humbly advise His Majesty to dismiss the appeal, and added that the costs of the appeal would be paid by the appellant. It only remains for their Lordships to state their reasons.

The suit in which the appeal was presented concerns land in Aden. It was brought, and properly brought, in the Court of the Political Resident there. The High Court of Judicature at Bombay has made an order for the transfer of the suit for trial and determination by the High Court itself.

The authority on which the High Court assumed to act is contained in clause 13 of the Letters Patent of 1865 for the High Court of Judicature for the Presidency of Bombay, which ordains that "the High Court of Judicature at Bombay shall have power to remove, and to try and determine, as a Court of Extraordinary Original Jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Presidency of Bombay, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court."

The High Court has duly recorded its reasons for the order of transfer. The propriety of the order is not disputed if there was power to make it. The only question, therefore, is whether the Court of the Resident at Aden is "subject to the superintendence" of the High Court at Bombay. To answer that question it is, in their Lordships' opinion, sufficient to refer to Act II of 1864 of the Governor-General in Council. By that Act, subject to certain amendments contained in Act IX of 1887, the administration of Civil Justice at Aden is now regulated. The preamble of the

(1) (1870) 6 B. L. R. 180.

Act contains a recital to the effect that certain judgments and proceedings of the Resident at Aden are not subject to the superintendence or revision of any Court of Justice except so far as they are subject to appeal to His Majesty in Council, and that it is expedient to provide for "the superintendence" or revision of such judgments and proceedings by the High Court at Bombay. No appeal is to lie from any decision or order of the Resident. But provision is made for a reference to the High Court at Bombay in a great number of cases, and in every case the Resident is bound to dispose of the matter before him conformably to the decision of the High Court. Then section 31 declares that the High Court shall have power to make general rules for regulating the practice and proceedings of the Court of the Resident, and also to frame forms for every proceeding for which the High Court shall think it necessary that a form should be provided, for keeping all books, entries, and accounts to be kept by the officers, and for the preparation and submission of any statements to be prepared and submitted by the Court of the Resident, and from time to time to alter any such rule or form, provided that such rules and forms shall not be inconsistent with the provisions of the Act or any other law in force.

The learned Counsel for the appellant, while admitting that the Court of the Resident was to a certain extent subject to the superintendence of the High Court of Bombay, contended that the superintendence, such as it was, was not so thorough or complete as to satisfy the requirements of clause 13 of the Letters Patent of 1865 when rightly understood. In support of this view they asked their Lordships to compare and contrast the language of clause 13 with the language of section 15 of 24 and 25 Vict., c. 104, usually called "The Charter Act," and to notice in section 15 the stress laid on the existence of appellate jurisdiction which ought, they said, to be imported into clause 13 of the Letters Patent, and, at the same time, to observe the omission from that clause of the power of transfer conferred by section 15 of the Charter Act. The answer to this ingenious, though somewhat contradictory, argument is simple enough. The power of transfer contained in the Charter Act has nothing to do with the power of removal conferred by the Letters Patent, and the

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Letters Patent make superintendence, not appellate jurisdiction, the condition of exercise of the power of removal which the High Court at Bombay has put in force.

Appeal dismissed.

Solicitor for the appellant: *The Solicitor, India Office.*

Solicitor for the respondents: *Holman, Birdwood and Co.*

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar.

1904.
September 10.

N. C. MACLEOD AND ANOTHER, PLAINTIFFS, v. KISSAN
VITHAL SINGH AND ANOTHER, DEFENDANTS.*

Practice—Receiver—Suit in ejectment by Receiver—Discharge of Receiver before termination of suit—Devolution of interest—Civil Procedure Code (Act XIV of 1882), sec. 372—Mortgage—Accession to mortgaged property—Transfer of Property Act (IV of 1882), secs. 8, 70—Lease by mortgagor—Sub-lease pendente lite—Rights of mortgagee.

Somjee, a Khoja merchant, died in 1885, leaving, as his survivors, four sons by his first wife (who predeceased him), his second wife Labai, and four sons by Labai.

By his will, Somjee gave the whole of his moveable and immoveable property to his sons by his first wife, directing them out of such property to give to Labai and her sons Rs. 30,000 within six years of his death.

On the 12th January 1899 Somjee's sons by his first wife mortgaged certain of the properties to the Bank of Bombay.

In 1903, the Bank having advertised such properties for sale under a power reserved to them by the mortgage-deed, Somjee's sons by Labai (who had since died) brought a suit (No. 554 of 1903) against Somjee's sons by his first wife and the Bank of Bombay, claiming that the properties could only be sold subject to the charge in their favour.

On the 14th January 1904, the Bank assigned the mortgage to Dwarkadas.

On the 26th January 1904 Mr. Macleod was appointed a Receiver by the Court.

On the 24th February 1904, the Receiver was authorised to file ejectment suits where necessary.

* Suit No. 177 of 1904.

On the 18th March 1904, the Receiver as plaintiff No. 1 and Dwarkadas as plaintiff No. 2 filed the present suit to eject Kissan, the first defendant, from a portion of the property mortgaged to the Bank.

Kissan claimed to be in possession under a lease from Goolam, the second defendant, one of the four sons of Somjee by his first wife.

After the commencement of the suit, Suit No. 554 of 1903 was disposed of in favour of the Bank of Bombay and the Receiver was discharged.

The first defendant contended that Dwarkadas had no right to join the Receiver in bringing the suit, that the moment the Receiver was discharged, his power to sue and with it the suit itself came to an end.

Held, that the Bank or its assignee Dwarkadas had a right to come in under section 372 of the Code of Civil Procedure and apply that the suit be continued by one or the other of them. No such application was in fact made because Dwarkadas was already on the record as plaintiff No. 2. The joinder of Dwarkadas as a co-plaintiff with the Receiver, though it was not perhaps strictly speaking legal at the time did not constitute a misjoinder.

Held, also, that a theatre, erected by the mortgagors on the land, after the execution of the mortgage, was, in the absence of a contract to the contrary, included in the mortgage.

The Transfer of Property Act makes no distinction between free-hold and lease-hold property for the purposes of the rule of law embodied in sections 8 and 70 of the Act. In this respect the Act reproduces the English law, which is, that all things which are annexed to the property mortgaged are part of the mortgage security and therefore the deed need contain no mention of structures or fixtures, unless a contrary intention can be collected from the deed.

Held, also, that if a mortgagor left in possession grants a lease without the concurrence of the mortgagee, the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them.

SOMJEE Parpia, a Khoja merchant, died in 1885, leaving, as his survivors, four sons by his first wife deceased, his second wife Labai, and four sons by Labai.

By his will, Somjee gave the whole of his moveable and immoveable property to his four sons by his first wife, directing them out of such property to give to Labai and her four sons Rs. 30,000 within six years of his death.

On the 12th January 1899 Somjee's sons by his first wife mortgaged certain of the properties to the Bank of Bombay.

On the 1st September 1903, the Bank having advertised such properties for sale under a power reserved to them by the mortgage-deed, Somjee's sons by Labai (who had since died) brought Suit No. 554 of 1903 against Somjee's sons by his first

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wife and the Bank of Bombay, claiming that the properties could only be sold subject to the charge in their favour.

On the 2nd December 1903 Goolam Hoosein, the second defendant in this suit, one of the four sons of Somjee Parpia by his first wife, leased a portion of the mortgaged property, called the New Elphinstone Theatre, to Kisan Vithal Singh, the first defendant.

On the 14th January 1904, the Bank assigned the mortgage to Dwarkadas Dharamsey, the second plaintiff in the present suit.

On the 26th January 1904 Mr. N. C. Macleod, the first plaintiff in the present suit, was appointed by the Court a Receiver in Suit No. 554 of 1903.

On the 24th February 1904, the Receiver was authorised to file ejectment suits where necessary.

On the 18th March 1904, the Receiver as plaintiff No. 1 and Dwarkadas Dharamsey as plaintiff No. 2 filed the present suit to eject Kisan Vithal Singh, the first defendant, from a portion of the mortgaged property, *viz.*, the New Elphinstone Theatre, of which he claimed to be in possession, under the lease dated 2nd December 1903, from Goolam Hoosein, the second defendant.

After the commencement of the suit, Suit No. 554 of 1903 was disposed of in favour of the Bank of Bombay, and the Receiver was discharged.

The following issues were raised at the trial :—

1. Whether, having regard to the order in Suit No. 554 of 1903, dated the 20th August 1904, discharging the first plaintiff from the office of Receiver, this suit can be maintained.
2. Whether the suit is not bad for misjoinder of plaintiffs.
3. Whether the Theatre structure is included in the mortgage of the 12th January 1899.
4. Whether the mortgage was assigned to the second plaintiff.
- 4 (a). Whether the second plaintiff is not a mere nominee for Ahmedbhoy.
- 4 (b). Whether, if so, Ahmedbhoy is not a necessary party.
5. Whether, if so, the second plaintiff acquired any right in the Theatre.
6. Whether the first plaintiff has any right to the possession of the Theatre.
7. Whether the lease dated the 2nd December 1903 is not a good and valid lease of the Theatre and binding against the plaintiffs.
8. Whether the lease is collusive and fraudulent and at a gross undervalue.

Lowndes, with him *Scott* (Advocate General), for the plaintiffs:—We should never have allowed the Receiver to be discharged had we not had the second plaintiff to fall back upon. The course, which we adopted, had, as its object, the avoidance of a multiplicity of suits.

Kirkpatrick, with him *Davar*, for defendant 1:—The Receiver alone was authorised to bring the suit. When he was discharged, his power to sue, and with it, the suit itself came to an end. The joinder of Dwarkadas as a co-plaintiff constituted a misjoinder. The New Elphinstone Theatre was erected on the land subsequent to the date of the mortgage. The omission of the words "buildings and fixtures" in the deed shows that the theatre is not included in the mortgage.

Defendant 2 in person.

CHANDAVARKAR, J.—This action is an offshoot of suit No. 554 of 1903, which was decided by me on the 23rd of August last, and has been brought by Mr. N. C. Macleod as Receiver appointed by the Court in that suit with power to sue, and suing as plaintiff No. 1, and by Mr. Dwarkadas Dharamsey as plaintiff No. 2, suing in the character of assignee of the Bank of Bombay, which was defendant No. 5 in the said suit. For a due understanding of the questions of law which arise, it is necessary to state succinctly some of the facts of that suit and the events which have led to the present action.

One Somjee Parpia, a Khoja merchant of Bombay, died in 1885, leaving him surviving four sons by his first wife who had predeceased him, his second wife Labai, and four sons by the latter. By his will Somjee gave the whole of his moveable and immoveable properties to his four sons by his first wife, and directed them to give out of those properties to Labai and her four sons Rs. 30,000 within six years from the date of his death. Somjee's four sons by his first wife mortgaged to the Bank of Bombay certain immoveable properties on the 12th of January 1899 by a deed (Exhibit A). The Bank having, under the power of sale reserved to them by that deed, advertised the properties for sale, the four sons of Somjee by his second wife Labai, (who had died by that time), gave notice of the charge

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in their favour for Rs. 30,000 and claimed that the properties should be sold subject to that charge. The Bank having denied the charge and set up a right of priority in favour of their mortgage, Labai's sons brought suit No. 554 of 1903 against the four sons of Somjee by his first wife, and the Bank of Bombay. After that suit had been filed, the Bank assigned the mortgage to Dwarkadas Dharamsey, the second plaintiff in the present suit, on the 14th of January 1904 (*vide* Exhibit B).

On the 26th of January 1904, Mr. Macleod was appointed by the Court Receiver in that suit of the immoveable properties except a portion which is not material to the present case (Exhibit 1).

On the 13th of February 1904, Dwarkadas Dharamsey was added as a party-defendant to that suit (Exhibit 2).

On the motion of the Bank of Bombay and of Dwarkadas Dharamsey, in the said suit, made on the 24th of February 1904, the Receiver was "authorised by the Court to file ejectment when necessary" (Exhibit 3).

Accordingly, on the 18th of March 1904, the Receiver as plaintiff No. 1 and Dwarkadas Dharamsey as plaintiff No. 2 filed the present suit, to eject defendant No. 1, Purdesi Kisen Vithal Sing, from the property in dispute, which was included in the mortgage to the Bank but of which the said defendant claimed to be in possession under a lease from the second defendant, Goolam Hoosen Somjee, one of the four sons of Somjee Parpia by his first wife, and defendant No 2 in suit No. 554 of 1903.

That suit was disposed of by me in favour of the Bank of Bombay except as to one point with which we are not in the present suit concerned. It was held that though the plaintiffs in that suit had a charge in their favour on the properties devised by Somjee's will to his four sons by his first wife yet the Bank of Bombay had a prior right to those properties (except as to one-fourth of one of them) in virtue of its mortgage as *bona fide* transferee for value. I accordingly passed an administration decree, subject to the said right of the Bank declared, and discharged the Receiver.

This was the state of things when the present suit came on for trial before me. And the first question raised by Mr. Kirk-

patrick, counsel for defendant No. 1, is, whether, having regard to the order made in suit No. 554 of 1903, discharging the first plaintiff from the office of Receiver, this suit can be maintained.

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Mr. Kirkpatrick's argument, as I have understood it, is this:—The first plaintiff was a Receiver, appointed by, and therefore an officer of, the Court, to whom an express power was given to file suits in ejectment when necessary. It was under that express power that he brought the present suit. No doubt the second plaintiff joined him, but he had no right to join the Receiver who was the only person empowered to sue. At the date of the suit, therefore, it was the first plaintiff alone who could bring the suit. It was his suit, and the moment he was subsequently discharged by the Court from the office of Receiver, his power to sue and with it the suit itself came to an end.

The industry of Counsel on either side has not enabled them to find any decided case as a direct authority on the point thus raised and I am left to decide it by the light of first principles.

Now, when a Court appoints a Receiver in a suit and empowers him to sue in ejectment a person who is not a party to the suit, the necessary implication is, that the Receiver as an official representative or trustee has to bring the suit for the benefit of the party, who may ultimately prove to be entitled to the property. When the party entitled to the property has been ascertained the Receiver will be considered his Receiver: *Sharp v. Carter* ⁽¹⁾; *Boehm v. Wood* ⁽²⁾.

Had a decree been passed in the present suit before the decision in suit No. 554 of 1903, such decree would have been *res judicata* as between the true owner when ascertained and the defendants in the present suit. That is the converse of the principle enunciated by West, J., in *Sanganabasaya v. Nagalingaya* ⁽³⁾ under the following circumstances:—

Section 10, clause I, of Bombay Regulation VIII of 1827 provides that if a person dies intestate, and without known heirs, leaving property, the Judge within whose jurisdiction the property is situate shall appoint an administrator for the

(1) (1735) 3 P. Wms. 375 at p. 379.

(2) (1823) 1 T. & R. 332 at p. 345.

(3) (1878) P. J., p. 173.

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management thereof. A having died intestate and without known heirs, leaving property, the Court appointed the Nazir its administrator. The Nazir having taken possession, B sued him in ejectment, alleging that he (B) was the heir. It was held in that suit that B was not the heir of the deceased. Subsequently C was adjudged to be the true heir in a suit to which B was not a party. B then sued C, again claiming to be the heir of the deceased. It was held that the decree passed in the suit by B against the Nazir was *res judicata* against B so as to preclude him from litigating the same title in a suit against C. West, J., said :—"It is not open to those, who have as heirs sued the official representative of an estate and failed, to sue the owner when ascertained a second time on the same right. Though his right was undetermined, it subsisted during the previous suits and was effectively represented at the cost and risk of his estate."

If this is so, the converse of it must also hold equally good. Where the official representative of an estate sues to recover possession of an estate while the true owner of it is being ascertained by proceedings duly instituted in a Court, any decree passed in favour of the official representative would be for the true owner when ascertained, though he was not a party to it, and bind the other party to the decree.

Accordingly, had Mr. Macleod, the first plaintiff in the present suit, succeeded in recovering possession of the property in dispute by means of a decree passed before his discharge in suit No. 554 of 1903, that decree would have enured for the benefit of the Bank of Bombay and its assigns, who by the decree in that suit have been held to be entitled to the property as mortgagees; and the present defendants could not have in that case maintained that a decree so obtained by the Receiver was not binding upon them in a suit as between them and the Bank or its assignee. Though the Bank's right had been undetermined at the date of the Receiver's suit, that right was subsequently determined on the basis of its existence at that date and the Receiver must be regarded as having sued and obtained the decree for its benefit and on its behalf under the express power conferred by the Court.

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The same principle should apply, if before the suit ends in a decree, the Receiver's office has come to an end. The Court appointed him as the official representative of the unascertained owner and gave him power to sue in ejectment for the benefit of such owner. When the Court conferred upon him that power it must be taken to have been well aware that the suit which it empowered him to bring might not result in a decree before the disposal of the suit in which the appointment was made; and it must also be taken to have intended that the suit he was empowered to bring should run its course and lead to a decree, though the Receiver's office might come to an end by reason of the disposal of the suit in which he was appointed and by reason of the determination of the party entitled to the property. When, therefore, that party was ascertained by the Court in suit No. 554 of 1903 and the Receiver was discharged, the party ascertained obtained a right to step into the Receiver's place, because the latter had held that place until then as the official representative of the party in question. When his power came to an end by reason of his discharge, it did not come to an end for the purpose of rendering abortive all the proceedings he had taken but only because the party entitled to the benefit of those proceedings having been determined, the necessity for the continuance of his office disappeared, and there was then the party entitled to continue those proceedings.

But, asked Mr. Kirkpatrick, under what law could the party so ascertained step into the shoes of the Receiver in this suit? The shortest answer to that is, under section 372 of the Code of Civil Procedure, which says: "In other cases of assignment, creation, or devolution of any interest pending the suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come either in addition to or in substitution for the person from whom it has passed." Now, the words "devolution of interest" have been held by the Calcutta High Court in *Sourindra Mohun Tagore v. Siromoni Debi*⁽¹⁾ to

(1) (1900) 28 Cal. 171.

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mean not only devolution by death but to be applicable to a case in which, pending a suit instituted by the Manager of a Chota Nagpore Encumbered Estate, the estate is released from management and restored to the owners. The learned Judges who decided that case refer to the use of the word "come" in the latter part of the section in support of their decision, which I am of opinion I should follow as putting a sensible construction on the section in question. The Legislature should not be presumed to have omitted to provide for a case of this kind if there are sections in the Code within which it can be brought by a reasonable interpretation of the words used. Now, in a strictly technical sense, where a decree declares or determines the right of a party to certain property it may be correct to say that it only declares what existed previously and that it does not create that right. But it is usual even in legal phraseology to speak of a right declared or determined by a decree in favour of a party as a right which has "come" to the party under the decree, and the use of so homely a word in section 372 is sufficient to show that by that section the Legislature intended to provide for all cases not falling within the sections as to devolution by assignment, marriage, or death. Until the decree the right was in the Receiver; after the decree and the Receiver's discharge, it "came" to the party determined by the decree.

The result, then, of the decree in suit No. 554 of 1903 was that the Receiver's interest in that suit devolved on the Bank of Bombay, the fifth defendant in that suit. The Bank or its assignee, Dwarkadas Dharamsey, the second plaintiff in the present suit, had, therefore, the right to come in under section 372 of the Code of Civil Procedure and apply that it be continued by either of them. No such application has indeed been made in this suit but none was made because the Bank's assignee, Dwarkadas, had already been on the record as plaintiff No. 2, having joined the Receiver in bringing the suit. It may be that at that time, such joinder was not, strictly speaking, legal; but that cannot constitute misjoinder. In *Bachubai and L. A. Watkins v. Shamji Jadowji*⁽¹⁾, the estate of a deceased testator having proved insolvent, an administration suit was filed by creditors.

(1) (1885) 9 Bom. 536.

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By a decree in that suit a Receiver was appointed. That Receiver brought a suit with the executrix of the testator as co-plaintiff in respect of certain property belonging to the deceased. It was contended on behalf of the defendant therein that there was a misjoinder, because the Receiver could sue only for what had been due to the testator's estate up to the moment of his death and the executrix could sue only for what was due after that. Sargent, C. J., and Bayley, J., held:—"Two suits would be quite unnecessary. Here apparently the Receiver might have sued alone to recover everything that was due to the estate; but for greater safety, the executrix, Bachubai, is added as a plaintiff. We do not think there is a misjoinder." In any case, when the present suit came on for hearing, Dwarkadas Dharamsey, who, as assignee of the Bank, had the right to ask the Court under section 372 to be placed on the record in place of the discharged Receiver, had already been on the record; and the defendants' Counsel and defendant No. 2 were heard on the question whether he was rightly there or not. I held that there was no misjoinder and that the suit could be continued. Moreover, the objection raised by Mr. Kirkpatrick that the suit could not be continued at the instance of Dwarkadas forms the subject of the present issue, and the result of my finding now is that it can be. That finding substantially satisfies the conditions of section 372. The fact that the name of the Receiver as plaintiff No. 1 is still there cannot prejudice the defendants. Though the Receiver was discharged by the decree in suit No. 554 of 1903, he has been continued on the record for greater safety as the person who initiated the suit. I find, therefore, the first issue in the affirmative.

On the second issue I have held that there was no misjoinder.

The next issue is—whether the structure known as the Elphinstone Theatre is included in the mortgage to the Bank of Bombay, dated the 12th of January 1899.

This was also one of the issues in suit No. 554 of 1903*, to

* NOTE.—The issue referred to by the learned Judge was decided in Suit 554 of 1903, *Sooleman Sonji and others v. Rahimtula Sonji and others*. Two appeals in this suit were heard by the Appellate Court and one judgment delivered in both appeals. From this judgment an appeal has been preferred to the Privy Council and is now *sub judice*.—Editor.

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which the Bank and the present plaintiff Dwarkadas Dharamsey, claiming as the Bank's assignee, and the present second defendant, Goolam Hoosein Somjee, were all party-defendants. In that suit I have found on the issue in the affirmative. Though the Bank and the present plaintiff Dwarkadas, and the present second defendant Goolam Hoosein Somji were all arrayed in that suit as defendants, yet the adjudication of the issue which was raised on the rival contentions of the plaintiffs in that suit and the present second defendant, Goolam Hoosein, on one side, and the Bank on the other, was necessary as between the defendants in that suit for giving the appropriate relief to the plaintiffs therein. Such an adjudication constituted *res judicata* between the defendants in that suit: *Ramchandra Narayan v. Narayan Mahadev*⁽¹⁾. The present second defendant, Goolam Hoosein Somjee, is, therefore, bound by my finding in the previous suit. The first defendant, Pardesi Kisen, is also bound because, though he was not a party to that suit, yet he claims under a title derived from the second defendant, Goolam Hoosein, after suit No. 554 of 1903 had been filed. That suit was brought on the 3rd of September 1903 whereas the sub-lease to the 1st defendant by the second defendant was executed on the 2nd of December 1903. The sub-lease is void on the principle of *lis pendens* (see section 52 of the Transfer of Property Act). I have, however, reconsidered the finding recorded by me on this issue in that suit and I see no reason whatever for coming to any other conclusion than that at which I arrived in that case. The main argument of Mr. Kirkpatrick, the first defendant's Counsel, in support of his contention that the Theatre is not included in the mortgage is that it is not specifically mentioned as part of the property mortgaged. The mortgage (Exhibit A) relates to two properties—(1) the house in Bhaji Pala Street and (2) the leasehold property at Falkland Road, which forms the subject-matter of the present suit. As to the former, the mortgage deed describes it as follows:—

“All those the several immoveable properties first described in the 1st schedule hereunder together with all buildings, fixtures, trees, rights, easements, advantages, and appurtenances whatsoever to the said premises appertaining or with the same held or enjoyed or reputed as part thereof or appurtenant thereto,

(1) (1886) 11 Bom. 216.

and all the estate, right, title, property, interest, claim and demand whatsoever of them the mortgagors in, to, out of, or upon the same premises."

In the 1st Schedule to the deed the same property is described as "all that piece of Fazandari land together with a messuage, tenement, or dwelling house thereon situate, etc."

Mr. Kirkpatrick's argument is that whereas as to the property abovementioned, the deed is specific in the mention of buildings and fixtures standing on the land, it is silent as to them when it deals with the leasehold property on Falkland Road, which is thus described :—

"The immoveable property secondly described in the said 1st Schedule hereto and all other (if any) the premises comprised in and expressed to be demised by the hereinbefore mentioned Indenture of Lease with their appurtenances and all the estate of them the mortgagors in the same."

And in the Schedule it is described as "all that piece or parcel of ground on which the New Victoria Theatre has been erected and is now standing."

The omission of the words "buildings and fixtures" from the description of this second property and their inclusion in the description of the first furnishes no doubt a point worthy of consideration in support of Mr. Kirkpatrick's argument but it must be weighed with other considerations.

Section 8 of the Transfer of Property Act provides :—

"Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

"Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, *and all things attached to the earth.*"

According to the second clause of the section, the Theatre which stood on the land in dispute at the date of the mortgage and was known as the "New Victoria Theatre" must as a thing attached to the earth be treated as having passed to the mortgagee "unless a different intention is expressed or necessarily implied."

Since the date of the mortgage, the mortgagors have removed it and erected a new structure in its place, called the Elphinstone Theatre. According to section 70 of the Transfer of Property Act :—

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"If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession."

Illustration (b) to the section is as follows :—

"A mortgages a certain plot of building land to B, and afterwards erects a house on the plot. For the purposes of his security B is entitled to the house as well as the plot."

The theatre, then, now standing on the land and erected after the execution of the mortgage, would be included in it, unless there was a contract to the contrary. The fact that the land mortgaged is a lease-hold is immaterial, for the Transfer of Property Act makes no distinction between free-hold and lease-hold property for the purposes of the rule of law embodied in the sections above quoted. In this respect the Act reproduces the English law, which is that all things which are annexed to the property mortgaged are part of the mortgage security and therefore the deed need contain no mention of structures or fixtures, unless a contrary intention can be collected from the deed: *Southport and West Lancashire Banking Company v. Thompson*⁽¹⁾.

The question, therefore, is, whether there is anything in the deed (Exhibit A) from which a contrary intention can be collected. It is said, there is such intention apparent upon the face of the deed because buildings and fixtures are specifically mentioned with reference to the property on Bháji Pála Street, whereas the deed is silent as to them with reference to the land now in dispute. But in judging of this contention we must have regard to the fact that the property in Bháji Pála Street with the buildings, etc., belonged absolutely to the mortgagors, whereas the land at Falkland Road was held by them for a definite period under a lease, the object of which, judging from its continued user, was to enable the mortgagors to use the land for the purposes of a theatre. And so it has been used ever since it was let. The 2nd defendant admits in his deposition that at first there was a mere shed on the land used as a theatre called the Old Victoria Theatre. Subsequently that shed was replaced by another structure called the New Victoria Theatre; and since then again that structure has been enlarged and is called

(1) (1887) 37 Ch. D. 64.

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the Elphinstone Theatre. The mortgagors' interest in the land leased to them was to use it by erecting a structure for the purposes of a theatre. This continued user of the land shows that a structure standing for the time being on the land was never intended to be permanent, that it could be from time to time changed, removed, or enlarged for the better and beneficial enjoyment of the land leased. There was, therefore, no necessity for specifically mentioning the structure, which stood on the land as indicative of the interest of the mortgagors in it. That interest was to use the land leased by erecting a structure or structures on it and occupying it. Now, the words in the mortgage-deed used with reference to this property are "the immoveable property described in the schedule and all other (if any) premises with their appurtenances and all the estate of the mortgagors in the same." The word "appurtenances" has, as pointed out in *Hill v. Grange*⁽¹⁾ and *Thomas v. Owen*,⁽²⁾ the meaning of "usually occupied," and would include a structure erected on a land for the purpose of its enjoyment. Then the words "all the estate of the mortgagors in the same," *i.e.*, in the land, are sufficient to include the structure in question as the estate of the mortgagors in the land. The reason, then, why the words "buildings and fixtures" were omitted from this portion of the deed is apparent. The property was lease-hold and enjoyed in a particular way. The structure standing on it indicated the mode of enjoyment and the estate of the mortgagors in the land. In *Plimmer v. Mayor, etc., of Wellington*⁽³⁾ it was held that, where land was occupied by a person under a revocable license from the owner to use it for the purposes of a wharfinger and where that person was allowed by the owner to erect a jetty on the land, the license ceased to be revocable and the person in question acquired "an estate or interest" in the land. That was held, following *Ramsden v. Dyson*.⁽⁴⁾ Now, if a right of that kind is an estate in land, equally so should be the right of a lessee to whom land was let for a definite period for the purpose of erecting a structure on it and using that structure for the beneficial enjoyment of the land. The right to such erection is an estate in the land belonging to

(1) Plowd. 170.

(3) (1884) 9 App. Cas. 699.

(2) (1887) 20 Q. B. D. 225 at p. 232.

(4) (1865) L. R. 1 H. L. 129.

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the lessee. These considerations outweigh whatever force might attach to Mr. Kirkpatrick's argument based on the omission of the words "buildings and fixtures" from the description of the property in dispute either in the body of the deed of mortgage itself or the schedule to it.

I have dealt with this issue at greater length here than in my judgment in suit No. 554 of 1903, because the 2nd defendant in addressing me on this case plaintively urged that certain material points had not been brought to my notice at the hearing of that suit. Evidence has accordingly been given in this case to show that before the execution of the mortgage-deed (Exhibit A) the Bank of Bombay returned to the mortgagors the plan of the New Victoria Theatre, which at that time stood on this land, whereas the Bank retained with themselves all other papers relating to the land. The inference I am asked to draw from that circumstance is that the theatre was not intended to be included in the mortgage. The inference which, in my opinion, should be drawn from the fact that the plan of the theatre which then stood on the land was returned by the Bank to the mortgagors is quite the reverse of that suggested by the 2nd defendant and by the 1st defendant's Counsel. If I am right in holding that no specific mention of the theatre as being included in the mortgage was made in the deed, because the theatre stood as indicative of the estate of the mortgagors in the land and was included in the words "the estate of the mortgagors in the same" which are inserted in the description of the property in the deed, and that the structure was liable to be removed or enlarged for the purposes of the beneficial enjoyment of the land, it follows that there was no necessity for the mortgagee to retain the plan of the theatre as it then stood on the land. Of what use was it to the mortgagee to attach to the deed the plan of a structure which might at any time, according to exigencies, be removed and another substituted in its place, for the better and beneficial enjoyment of the land?

I find, therefore, the third issue in the affirmative.

I now turn to the fourth issue, which is—whether the Bank has assigned the mortgage to the 2nd plaintiff Dwarkadas Dharamsey, whether the said Dwarkadas is a *bona fide* assignee

of the mortgage or only a nominee of Ahmedbhoy Habibhoy, one of the directors of the Bank, and whether the said Ahmedbhoy is not a necessary party to the suit ?

The assignment by the Bank to Dwarkadas Dharamsey is proved by the deed (Exhibit B), dated the 14th of January 1904. He has proved that he paid the Bank by a cheque drawn upon the National Bank with whom he has an account. His pass book showing his account with the National Bank has been put in (Exhibit 11) and it corroborates him. We have then at the outset this fact *prima facie* proved that the 2nd plaintiff has paid the Bank money which came from his pockets. Now, what are the facts relied upon to show that he is only a nominee of Ahmedbhoy ? Stated shortly, they are as follows:—Ahmedbhoy is a director of the Bank of Bombay. He knew all about the intentions of the Bank as regards the assignment of the mortgage. The 2nd defendant offered to buy the mortgage from the Bank but the offer was declined ; one Readymoney thereafter made a similar offer with the same result. Shortly after Readymoney's offer, Dwarkadas Dharamsey wrote to the Bank a letter (Exhibit 4), dated the 24th of November 1903, offering to buy the mortgage for Rs. 42,000—a sum less than that of the offer of the 2nd defendant or of Readymoney. The Bank accepted Dwarkadas' offer on the 27th of November 1903: (Exhibit 10).

We start, then, with the fact that the Bank assigned the mortgage, which was for Rs. 52,000, to the 2nd plaintiff for Rs. 42,000, after having rejected two higher offers. There is also the fact that the offer made by the 2nd plaintiff was just on the heels of Readymoney's. The 2nd plaintiff admits that he heard one day, while he had gone to the Bank as usual on business, that the Bank intended to assign the mortgage. He cannot say from whom he got the information at the Bank but he admits that he made further enquiries of his intimate friend Abdulla Hussein, a son-in-law of Ahmedbhoy Habibhoy, and that gentleman informed him that the assignment could be had for Rs. 42,000 and also that Readymoney had made an offer. The 2nd plaintiff learnt of the conditions and terms of Readymoney's offer from Abdulla. The 2nd plaintiff did not look into the papers relating to the mortgaged properties before taking the assignment from

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the Bank, but, to quote his own words, "I took it in the dark, trusting to the business capacities of the Bank of Bombay." Nor did he, after the assignment, look into the mortgage-deed or the plans attached to it. He had one *hundi* transaction of Rs. 25,000 with Ahmedbhoy before the assignment—Ahmedbhoy had accepted *hundis* indorsed by the 2nd plaintiff in favour and for the accommodation of Visram Ebrahim & Co. After the assignment the 2nd plaintiff has had many transactions with Ahmedbhoy, who has since then indorsed his *hundis*. The 2nd plaintiff admits :—"At the date of my assignment I was indebted to Ahmedbhoy to the extent of Rs. 55,000."

These are the facts culled from the 2nd plaintiff's deposition, and upon them I am asked to hold that the 2nd plaintiff is a mere tool in the hands of his creditor, Ahmedbhoy Habibhoy, and that the latter, seeing that as a director of the Bank of Bombay he could not take the assignment of the mortgage in his own name, put forward the 2nd plaintiff, assisted him with information, and took the assignment in his name. I confess there is just an apparently suspicious look about some at all events of these facts. It is not clear why the Bank rejected the 2nd defendant's and Readymoney's offers. The 2nd plaintiff's asseveration that he had no conversation whatever with Ahmedbhoy about this property may be true but there is the fact that he got his information and advice from Ahmedbhoy's son-in-law. That suggests the question—whence did the son-in-law get his information? Then there is the fact that the 2nd plaintiff was indebted to Ahmedbhoy at the date of the assignment. But, however suspicious all this may be, I cannot act upon mere suspicion and hold that the 2nd plaintiff is a mere *bendimidār* for Ahmedbhoy in the face of the fact that the Bank dealt with and made the assignment to the 2nd plaintiff and that the moneys paid to the Bank as consideration for the assignment came from funds held by the National Bank as belonging to him. It is suggested that these funds were in reality those which had come from Ahmedbhoy and reliance was placed by defendant's Counsel, Mr. Kirkpatrick, upon the fact admitted by the 2nd plaintiff that on or about the date of the assignment his cash book entries show that he had no balances large enough to pay Rs. 42,000 or Rs. 40,000 to

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the Bank. But the 2nd plaintiff has proved by his pass book that on these days he sent large sums to the National Bank which are credited to his account and he has explained that these amounts could not be included in his daily balances because they were sent to the Bank. "In matters of this description," say the Privy Council in *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty*,⁽¹⁾ "it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony." There it was argued that the appellant must be held a *benámidár* because he was unable to give a satisfactory account, nay might be supposed to have given a false account in part, "as to the manner in which he became possessed of the money" paid for the alleged *benámi* purchase. That argument was disposed of by their Lordships in these words:—"Their Lordships have been much struck with the unsatisfactory character of the account given by the appellant of the manner in which he alleges he obtained the money, but we cannot help feeling, that it is an inquiry upon which it is not very difficult to suppose that the person who becomes the purchaser of an estate may be unwilling to give a very full statement. But this circumstance, although it might excite doubt, is not a thing from which we can legitimately infer that the appellant was a bare trustee of the purchase so made by him." And then their Lordships further remark:—"If we were to take away men's estates upon inferences derived from such circumstances as these, it would be impossible that any property could be safe."

My findings, therefore, on issues Nos. 4 (a) and 4 (b) are that the 2nd plaintiff, Dwarkadas Dharamsey, is a *bond fide* assignee of the mortgage (Exhibit A), who has acquired a right to and interest in the property in dispute, including the Elphinstone Theatre, and that Ahmedbhoy Habibhoy is not a necessary party to the suit.

The next question is—whether the plaintiff can eject defendant No. 1 or his lessor defendant No. 2 from this lease-hold property in view of the fact that both at the date of the plaintiff's

(1) (1866) 11 Moo, L. A. 28 at p. 44.

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assignment and the date of the suit the term of the lease (Exhibit No. 8) had expired and no fresh lease has yet been taken from the lessor? The lease (Exhibit No. 8) under which the property was acquired by the 2nd defendant is dated the 14th of October 1892 and was for 15 years commencing from the 15th of July 1888. It, therefore, expired on the 15th of July 1903. But there is in it a covenant for renewal for 10 years in favour of the lessee (the 2nd defendant), his heirs, executors, administrators and assigns. Such a covenant has been held to run with the land : *Roe d. Bamford v. Hayley*⁽¹⁾ ; *Simpson v. Clayton*⁽²⁾. The mortgage-deed (Exhibit A) provides that, if the mortgagors commit default in obtaining the renewal, the mortgagee is entitled to obtain it. Further, the mortgage-deed entitled the mortgagee to enter into possession on non-payment of the mortgage amount upon demand within the period stipulated. That such a demand was made on the 3rd of September 1900 by the Bank is proved by Exhibit D. It does not lie in the mouth of the mortgagors and those claiming under them to say that they are entitled to retain possession merely because the old lease has expired and no fresh lease has been obtained. That is a question which the lessor may raise, but as between the mortgagors or their assignees and the mortgagees or their assignees effect must be given to the terms of the mortgage-deed. Though the term of the old lease has expired, the mortgagors still hold possession with the right to obtain a fresh lease. Their possession cannot be said to be wrongful even as against the lessor. Had they obtained a fresh lease under the covenant in the old lease, it would have enured for the benefit of the mortgagee. Their possession, therefore, notwithstanding the absence of a fresh lease, must be regarded as coming from the same root as possession under a renewed lease.

But the 1st defendant claims to be in possession of the theatre under a sub-lease dated the 2nd December 1903 from the 2nd defendant (Exhibit 12). I have already said that it is void as having been made *pendente lite*. It is contended for the plaintiff that this sub-lease is a fraudulent and collusive

(1) (1810) 12 East. 464.

(2) (1838) 4 Bing. N. C. 758.

transaction, got up for the purpose of defeating the mortgagee's rights under the mortgage. It is no doubt the case that this sub-lease is for three years, the longest period for which the 2nd defendant has sub-let to anyone, the previous sub-leases having been, as admitted by that defendant, for much shorter periods. After the sub-lease the 1st defendant has given to the 2nd defendant a power of attorney and the 2nd defendant has collected the rents and paid the taxes. These are no doubt circumstances suggestive of suspicion, especially when they are coupled with the fact that the sub-lease came into existence just about the time the Bank declined to accept the 2nd defendant's offer to buy the mortgage. But I do not think the evidence is cogent and clear enough to justify the inference of fraud and collusion, though there is this to be said that the 1st defendant has not gone into the witness-box to deny that the sub lease represents a sham and colourable transaction. It is not, however, necessary to discuss this question further. Even assuming the sub-lease to be a *bond fide* transaction, the law plainly is, as was held in *Keech v. Hall*,⁽¹⁾ that "the possession held by the mortgagor or those claiming under him until the mortgagee thinks fit to enter is, in the strictest sense, precarious and held at the mere will of the mortgagee." "If a mortgagor left in possession grants a lease without the concurrence of the mortgagees (and for this purpose it makes no difference whether it is an equitable lease by an agreement under which possession is taken, or a legal lease by actual demise) the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagees may be asserted against both of them" (per Earl of Selborne, L. C., in *Corbett v. Plowden*⁽²⁾). The 1st defendant's sub-lease is, therefore, not binding on the plaintiff. But it is urged that the Bank of Bombay, under whom the plaintiff claims, having allowed the 2nd defendant to sub-let the theatre on many occasions, and such sub-letting having been in the usual course of user of the property, the 2nd defendant must be presumed to have acted either as the

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Bank's agent or with the Bank's consent and that the 1st defendant acquired his right as a *bond fide* sub-lessee. There is no evidence to show that the 2nd defendant acted as the Bank's agent or that the Bank even assented to the sub-letting by him in such a way as to estop the Bank from asserting its rights under the mortgage against the sub-lessees. I cannot presume such agency or such assent from the mere fact that the 2nd defendant was allowed to remain in possession and to sub-let. He was so allowed subject to the condition in the mortgage-deed that, if there should be demand for payment and the mortgagors should fail to pay, the Bank or its assignees should have the right to enter into possession. The mortgage-deed was registered and the 1st defendant must be treated as having had notice of its terms. As pointed out by Romer, L. J., in *Reynolds v. Ashby & Son, Limited*,⁽¹⁾ "it would be very dangerous if anything like a general authority to the mortgagor to deal with or affect the mortgaged property could be implied from the mere fact that the mortgagee has not taken possession of it." [His Lordship then recorded findings on the remaining issues.]

Attorneys for the plaintiff:—*Messrs. Crawford, Brown & Co.*

Attorneys for the defendants:—*Messrs. Captain & Vaidya and Messrs. Thakurdas & Co.*

A. H. S. A.

(1) [1903] 1 K. B. 87 at p. 102.

ORIGINAL CIVIL.

Before Mr. Justice Tyahji.

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September 20.

HAJI SABOO SIDICK, ORIGINAL PLAINTIFF, v. ALLY MAHOMED
JAN MAHOMED AND OTHERS, ORIGINAL DEFENDANTS.*

Kutchi Memons—Succession—Hindu Law—Sons administering the property of their deceased father.

Among the Kutchi Memons, who are governed by Hindu Law, the sons as heirs are entitled to the estate of their deceased father, subject to the payment of his debts. They are, therefore, entitled to take possession of their father's property, to administer it, and to pay debts without being liable to account to the Court otherwise than as heirs.

Veerasokkaraju v. Papiak⁽¹⁾ followed.

* O. C. J. Suit No. 515 of 1903.

(1) (1902) 26 Mad. 792.

THIS was a suit brought by Haji Saboo Sidick, for the administration of the property of Jan Mahomed Haji Ahmed, who died on the 23rd April 1903, leaving behind him surviving his widow (defendant 3) and two sons (defendants 1 and 2).

The plaintiff had lent Rs. 2,500 to the deceased on the 29th March 1903, for which the latter passed a promissory note in his favour.

The defendants Nos. 4 and 5 were joined as executors *de son tort*. Defendants Nos. 6 and 7, who were creditors of the deceased, were also joined for a similar reason.

The plaintiff's complaint was that "immediately on the death of the said deceased all the defendants . . . took possession of the property of the deceased consisting of the stock in trade and goods in his shop and intermeddled with the same and began distributing the same among themselves and certain other creditors of the deceased with whom they were on friendly terms without regard to and in fraud of the right of all the other creditors of the deceased." He, therefore, prayed that the estate of the deceased may be administered by the Court; that the defendants and each of them may be ordered to make full discovery of, and to account for, all the estate of the deceased come to the hands of the defendants or any of them and of their application of the same; that a Receiver may be appointed of the estate of the said deceased with power to file suits to recover any property of the deceased wrongfully disposed of by the defendants or any of them and to recover the outstandings due to the deceased; that the estate of the deceased when ascertained may be distributed between the plaintiff and the other creditors of the deceased according to their rights.

Davar and *Lowndes*, for the plaintiff.

Kanga and *Khairaz*, for defendants 1 and 2.

Scott (Advocate-General) and *Strangman*, for defendants 6 and 7.

TYABJI, J.:—The plaintiff claims that the estate of the late Jan Mahomed Haji Ahmed may be administered by this Court and that the defendants and each of them may be ordered to make a full discovery of, and to account for, all the estate of the said deceased which has come to their hands or any of them, and of

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their application of the same; that a Receiver be appointed of the estate of the said deceased, with power to file suits, to recover any property of the deceased wrongfully disposed by the defendants, or any of them, and to recover the outstandings due to the deceased; and that the estate of the deceased, when ascertained, may be distributed between the plaintiff and the other creditors of the deceased, for costs of the suit and for further and other reliefs.

The suit is filed by one Haji Saboo Sidick, a Memon Merchant of Bombay, originally against seven defendants. The 1st and 2nd defendants are the sons of the deceased, the 3rd defendant is the widow of the deceased. The 4th defendant is a broker, and it is sought to make him liable as executor *de son tort*. The 5th defendant is a merchant, and he is made liable also as an executor *de son tort*. The 6th defendant is also a merchant, and is sued because he has taken possession of certain property and also as executor *de son tort*; and the 7th defendant is also sued in a similar manner.

The plaintiff Haji Saboo Sidick is a creditor of the deceased Haji Jan Mahomed on a promissory note of Rs. 2,500. Jan Mahomed died on the 23rd April 1903: the date of Jan Mahomed's death, given in the plaint as being the 5th May 1903, is admitted by the plaintiff to be a mistake.

The plaintiff complains that, immediately after the death of Haji Jan Mahomed, the defendants took possession of all his property and his stock in trade, and without any justification proceeded to deal with the property, and proceeded to distribute the stock in trade and goods among the various creditors in any way they liked, and not proportionately. The contention of the plaintiff in short is that this amounted to tort, on the part of the defendants, and that they all have rendered themselves liable as executors *de son tort*, and that the goods, which have gone into the possession of the various creditors, should be brought back and distributed among the various creditors rateably.

On the other hand the defendants 6 and 7 claim that they were rightfully in possession of the goods as creditors.

Now defendants 1 and 2 are the sons of the deceased, and the deceased being a Kutchi Memon, with regard to inheritance his

family is governed by the rules of inheritance under the Hindu Law. Therefore defendants 1 and 2 as heirs were entitled to the estate of the deceased, subject, of course, to the payment of his debts.

Defendant 6 is a creditor of the deceased on two promissory notes of Rs. 2,500 each. He says that he received the goods in question, in part satisfaction of his claim of Rs. 5,000 from the 2nd defendant, and that he is entitled to retain these goods, and that he is not liable to account for the goods, or share the value of the goods rateably with other creditors. The 7th defendant Ebrahim Haji Haroon is creditor to the extent of Rs. 2,500 under a promissory note. His contention is similar to that of defendant 6.

The question, therefore, it seems to me, in spite of the time taken in argument, is a simple one. The present suit is prosecuted against defendants Nos. 1, 2, 6 and 7, defendants 4 and 5 having been disposed of by the previous order of this Court. The question is whether defendants 6 and 7 are bound to bring into hotch-potch the goods they have taken away and share with the other creditors, or can they retain them? The provisions of the Indian Succession Act do not apply to the parties in the suit except so far as they may have been extended to them by the Probate and Administration Act. The provisions as to executors *de son tort* are not reproduced in the Probate and Administration Act, nor are the Hindus and Mahomedans bound to take out probate of the will of the deceased. It is quite clear that defendants 1 and 2, being heirs, were entitled to take possession of the property, to administer the property, and to pay debts without being liable to account to the Court otherwise than as heirs. This is quite clear from the case of *Veerasokkaraju v. Papiiah*⁽¹⁾, the head-note in that case being:—

“The unsecured creditors of a deceased Hindu have no charge or lien on the inheritance. If payments are not made by the heir rateably, it does not follow that he has failed to apply the assets duly. Every payment on account of a debt is perfectly lawful, irrespective of its effect upon the other creditors, and is a due application of the assets within the meaning of section 252 of the Code of Civil Procedure.”

(1) (1902) 26 Mad. 792.

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[His Lordship read portions bearing on this point from the judgment of Subrahmania Ayyar, J., at page 796.]

I entirely agree with the judgment I have read and I must hold that defendants 1 and 2, as sons and heirs of the deceased Jan Mahomed, were entitled to pay the various creditors in the way they have done. The only question is whether there is any collusion. As to this there is not a scintilla of evidence, except the mere suggestion of Mr. Davar, that there has been collusion, but Mr. Davar's suggestion is not supported by a tittle of evidence.

Defendants 1 and 2, therefore, being heirs, and having carried on the business, were fully justified in their proceedings.

As regards defendant 1, however, I must observe that he was separate from his father, and beyond visiting the shop now and then he took no part in the proceedings complained of, and the allegations against him are entirely unsupported.

I hold that defendants 6 and 7 are not bound to account for the goods which they have received. They were given to them in satisfaction or part satisfaction of their claims and the plaintiff must pay their costs.

Defendant 1 has not interfered and so the plaintiff must pay his costs of the contention against him.

Defendant 2 has undoubtedly interfered but he was justified in doing what he has done and the plaintiff must pay the costs of the issues raised against him also.

The other defendants have been already discharged from attendance on this issue.

Suit against defendants 6 and 7 must be dismissed, but defendants 1 and 2 will be retained and must account for whatever assets have come into their hands. The decree against them will be that they are liable and must account for any assets that may have come into their hands.

Attorneys for the plaintiff:—*Messrs. Edgelow, Gulabchand & Wadia.*

Attorneys for the defendants:—*Mr. J. P. Dastur, Messrs. Sorabji & Jehangir, Messrs. Matubhai, Jamietram & Madan, Messrs. Payne & Co., Messrs. Little & Co., and Messrs. Ardeshir, Hormasji, Dinsha & Co.*

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar.

IN THE MATTER OF THE LAND ACQUISITION ACT.

IN THE MATTER OF GOVERNMENT AND NANU KOTHARE AND OTHERS.

*Land Acquisition Act, I of 1894, sections 12 and 18—Notice by the Collector—Reference to Court—Construction of statute—Meaning of word “immediately.”*1905.
August 8.

The provisions of the Land Acquisition Act for the compulsory acquirement of private property are made for the public benefit, and, in the case of such Acts, “if upon words or expressions at all ambiguous it would seem that the balance of hardship or inconvenience would be strongly against the public on the one construction or strongly against a private person on another construction, it is consistent with all sound principles to pay regard to that balance of inconvenience.”

Dixon’s case⁽¹⁾ followed.

The word “notice” as used in clause (b) of the proviso to section 18 of the Land Acquisition Act, I of 1894, means notice whether immediate or not. The clause in question prescribes one of two periods of limitation for a party who has not accepted the Collector’s award, *viz.*, either six weeks from the date of the receipt of the Collector’s notice, whether immediate or not, or six months from the date of the award: *whichever period shall first expire.*

Where a statute or written contract provides that a certain thing shall be done “immediately,” regard must be had, in construing that word, to the object of the statute or contract as the case may be, to the position of the parties, and to the purpose for which the Legislature or the parties to the contract intend that it shall be done immediately.

The conditions prescribed by section 18 of the Act are the conditions to which the power of the Collector to make the reference is subject, and these conditions must be fulfilled before the Court can have jurisdiction to entertain the reference.

Dixon v. Caledonian Railway Co. ⁽¹⁾ referred to, *Christie v. Richardson* ⁽²⁾, *Raleigh v. Atkinson* ⁽³⁾ and *In re the application of Sheshamma* ⁽⁴⁾, followed.

REFERENCE from the Collector of Bombay.

The material facts in this case are fully set out in the judgment of the Court.

Raikes (Acting Advocate-General), for Government:—We take a preliminary objection as to limitation. This is a case coming under sub-section (b) of section 18 of the Land Acquisition Act,

(1) (1880) 5 App. Cas. p. 827.

(2) (1842) 10 M. & W. 638.

(3) (1840) 6 M. & W. 677.

(4) (1887) 12 Bom. 276.

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I of 1894. We rely upon the letter, dated 23rd September 1904, from the Collector to the claimants' attorneys which was received on Saturday, 24th September 1904, and also the claimants' attorneys' letter, dated 7th October 1904, to the Collector.

The claimants' attorneys expressly state that they will send in their formal request under section 18 in due time. They do so by their letter of 9th November 1904. Section 18 requires that the application should be within six weeks. The six weeks in the present case expired on Saturday, 5th November 1904, and when that time has passed the claimants' rights are gone. This reference, being out of time, is a nullity, and the Court cannot go into the matter.

Young, for the Municipal Corporation of Bombay, supported the contentions of the Acting Advocate-General.

Davar with *Jardine*, for the claimants: — If the case is as stated by Counsel for Government it is hard on the claimants. The award was made on 19th September 1904 but notice was not given to us as contemplated by section 12 (2) of the Land Acquisition Act.

When the award was made we were not present and *immediate* notice should have been given. Four days cannot be considered "immediate." We submit, therefore, that we must have six months' time within which to bring the matter to the notice of the Court. Our letter, dated 7th October 1904, to the Collector should also be considered. Is it not sufficient notice under section 18? That letter clearly states that the claimants do not accept the award, and we submit this amounts to an intimation of our intention to refer the matter to Court. The amount of compensation was the only matter in dispute and the letter of the 7th October 1904 already referred was sufficient notice to satisfy the conditions of section 18 of the Land Acquisition Act. Our notice of the 9th November 1904 is only a more formal expression of our previous intimation. We rely on section 6 of the Limitation Act and time must be deducted that was occupied in obtaining a copy of the award: *Golap Chand v. Krishto Chunder*⁽¹⁾, *Guracharya v. The President of the Belgaum Town*

(1) (1879) 5 Cal. 314.

Municipalities⁽¹⁾. The word "immediately" cannot mean 5 days. The Collector cannot plead pressure of work because it is a duty imposed by Legislature. If notice under section 12 is not given then we are entitled to six months, and no such notice, we contend, was given.

Raikes, in reply:—The Court has suggested that the Collector has waived limitation by his letter, dated the 9th November 1904. As to this we say the Collector's act is not a judicial act, he does not exercise judicial functions: *Ezra v. Secretary of State for India*⁽²⁾.

The letter of the 7th October 1904 relied on by the claimants is not the application contemplated by the Act; moreover, they say in that very letter that they will make their application *in due time*. This objection as to limitation is taken by us on behalf of Government and not the Collector. The Collector cannot waive either the right of Government or of the Municipality.

As to the word "immediately," it means as soon as one conveniently can; Stroud's Dictionary. Further, under section 18 of the Land Acquisition Act even if the Collector waits four months his notice will be good. The time in this case runs from the date of the receipt of the Collector's notice: Starling's Limitation Act, 4th Edn., p. 33.

CHANDAVARKAR, J. :—This is a reference, made to this Court by the Collector of Bombay, under section 19 of the Land Acquisition Act, 1894, upon the application of the executors of one Chanda Ramji deceased, hereinafter called the claimants, who complain that the Collector has by his award directed the payment of compensation, which is too low in respect of the compulsory acquisition by Government of certain land, situate at Hamálwádi, Dhobi Taláo, forming part of the deceased's property.

A preliminary objection to the jurisdiction of the Court to hear the reference on the merits has been raised by the learned Advocate-General, Mr. Raikes, on behalf of Government, and by Mr. Young on behalf of the Bombay Municipality, for whom Government have compulsorily acquired the land under the provisions of the Act.

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(1) (1884) 8 Bom. 529.

(2) (1905) 32 Cal. 605.

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That objection, shortly stated, is that the written application of the claimants requiring the Collector to make a reference to the Court was made after the period of limitation of six weeks prescribed by the first part of clause (b) of the proviso to section 18 of the Act.

It is common ground between the parties that the claimants did not appear and were not represented before the Collector when he made his award.

The undisputed facts, upon which this preliminary objection to this reference is based, are as follows :—

The Collector made his award on the 19th of September 1904.

On the 23rd of September 1904 the Collector addressed a letter to Messrs. Nanu Hormusji, attorneys for the claimants, giving notice of his award. That letter was in these terms :—

“With reference to the acquisition of the above land I have the honour to inform you that I have made the following award in this matter :—

AWARD.

1. The true area of the land is 638 sq. yards.
2. The compensation to be paid for this area is Rs. 15,172 together with 15 per cent. on this sum or Rs. 2,275-12-9, in respect of compulsory acquisition, or a total of Rs. 17,447-12-9.
3. The whole of this amount is payable to Bai Sakarbai, widow of the late Chanda Ramji, Mr. Nanu Narayan Kothare, and Mr. Hormusji Muncherji Chichgur, as trustees of the will of the late Chanda Ramji.”

This notice purported to be under sub-section (2) of section 12 of the Act.

Messrs. Nanu and Hormusji received the notice on the 24th of September 1904.

On the 7th October 1904 they addressed the following letter to the Collector :—

“Referring to your award L. R. A. 565, dated the 23rd day of September last, in regard to acquisition of the property belonging to the estate of the late Mr. Chanda Ramji, situate at Hamálwádi, Dhobi Taláo, we have the honour on behalf of our clients Messrs. Nanu Narayan Kothare and Hormusji Muncherji Chichgur, the surviving executors of the late Mr. Chanda Ramji, to state that they do not accept the said award.

We will send you in due time a formal request to refer the matter for the determination of the High Court of Judicature at Bombay under section 18 of the Land Acquisition Act, 1894. In the meantime we have to request you

to let us have a copy of the notes of your judgment. We will of course pay the usual copying fee.

One of the executors Bai Sakarbai, widow of the late Mr. Chanda Ramji, died on or about the 2nd day of February 1904, and Messrs. Nanu Narayan Kothare and Hormusji Mancherji Chichgur are the surviving executors and trustees of the will of Mr. Chanda Ramji.

We have to request you therefore to let us know if you have any objection to our clients, the surviving executors and trustees, receiving under protest the compensation awarded."

On the 12th of October 1904 the Collector informed the claimants' attorneys that a copy of his judgment would be granted and that he had no objection to their receiving under protest the award money as attorneys to the executors.

On the 14th October 1904, the attorneys wrote to the Collector that they would attend his office on the 21st of that month to receive the money and that they would receive it "as attorneys to the executors under protest."

On the 9th of November 1904, *i. e.*, after six weeks had expired from the date of the receipt by them of the Collector's notice on the 24th of September, the claimants' attorneys addressed the following letter to him :—

"On behalf of Messrs. Nanu Narayan Khothare and Hormusji Muncherji Chichgur, the surviving executors of the last will of the late Chanda Ramji, we have the honour to request you under section 18 of the Land Acquisition Act that this matter be referred by you for the determination of the High Court, as our clients do not accept your award on the ground that the amount of compensation awarded is very low. They contend that such compensation ought to be Rs. (30,000) thirty thousand and fifteen per cent. on the said sum in consideration of the compulsory nature of the acquisition."

Acting upon this the Collector has made the present reference under section 19 of the Act.

Upon these facts, the learned Advocate-General's contention, in support of his preliminary objection, is that this letter of the 9th of November 1904 requiring the Collector to make the reference having been addressed to him after six weeks had expired from the receipt of his notice on the 24th of September, the reference is *ultra vires*.

The learned Counsel, Mr. D. D. Davar, who has appeared for the claimants in support of the reference, has three answers to the preliminary objection.

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First, he argues that the period of limitation of six weeks prescribed by the first part of clause (b) of the proviso to section 18 of the Act cannot apply here, because the notice of his award given by the Collector to the claimants' attorneys was not "immediate notice" as required by sub-section (2) of section 12.

After directing in sub-section (1) that the Collector's award when made shall be filed in his office, section 12, sub-section (2) of the Act proceeds as follows :—

"The Collector shall give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made."

The next section which is material is section 18 of the Act. It gives the party interested, who has not accepted the award, a right to require the Collector to make a reference to the Court, but it provides that the right must be exercised by the party within the period prescribed therein, *viz.*, "within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire."

Now, on Mr. Davar's construction, "the notice from the Collector under section 12, sub-section (2)," must mean the "immediate notice" prescribed in that sub-section. That, no doubt, is the natural or literal meaning of the words. It may fairly be argued that there is all the greater reason here why we should adhere to that meaning, because we are construing a section which prescribes a period of limitation within which alone a party can assert a right conferred upon him by the Legislature and it is a canon of construction that statutes of limitation should be construed strictly.

But there are difficulties in the adoption of this literal construction which, I think, are unanswerable.

In the first place, if the word "notice" in clause (b) of the proviso to section 18 be restricted to "immediate notice," it must follow that the Collector has no power to give any but immediate notice and that a late notice is bad. And if a late notice is bad and inoperative, what is the result? Does the award of the Collector become void and do all his proceedings become abortive if no "immediate notice" is given by him as

directed in sub-section (2) of section 12? There is no express provision in the Act stating that such shall be the result of a late notice. We have only to infer it.

But before we draw such inference we must see whether the literal construction contended for by Mr. Davar and the effect which under the Act he seeks to impute to a late notice given by the Collector are consistent with the language and tenor of clause (b) of the proviso to section 18 and of the rest of the Act.

Now, according to clause (b) of the proviso to section 18, every application, requiring the Collector to refer the matter for the determination of the Court, shall be made, in cases where the party interested, who has not accepted the award, was not present or represented before the Collector when the latter made his award, "within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, *whichever period shall first expire.*" I italicize the words "*whichever period shall first expire*" because they afford the real clue to the interpretation of the clause. The alternative period of "six months from the date of the Collector's award" can expire first, *i. e.*, before the other period of six weeks from the receipt of the Collector's notice, only when that notice has been given four months after the date of the award. A notice given four months after that date can hardly be "immediate notice." Nevertheless, that the clause in question does clearly contemplate the giving of such late notice and provide for the computation of the time of six weeks from its receipt for the purposes of limitation is obvious from the words "*whichever period shall first expire.*" Those words would have to be struck out of the clause to restrict the word "notice" to an immediate notice. Those words obviously point to a late as well as to an immediate notice from the Collector: and that is the only meaning which can be attached to the word "notice," occurring in the clause, consistently with those words.

We have, then, in the language of clause (b) of the proviso to section 18 words used by the Legislature which modify or control the language of sub-section (2) of section 12, or, what is

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perhaps more appropriate to say, which make clear the intention of the Legislature that a late notice may be given by the Collector as well as an immediate notice.

Why, then, it may be asked, have the Legislature imposed upon the Collector the duty of giving "immediate notice" by sub-section (2) of section 12 of the Act? The answer to that is afforded by the purpose and policy of the Land Acquisition Act.

In construing that sub-section and section 18 it is, I think, a matter of prime importance to bear in mind that the provisions of the Land Acquisition Act for the compulsory acquirement of private property are made for public benefit and in the case of such Acts, as pointed out by Lord Selborne in *Dixon's case*,⁽¹⁾ "if upon words or expressions at all ambiguous it would seem that the balance of hardship or inconvenience would be strongly against the public on the one construction, or strongly against a private person on another construction, it is, I think, consistent with all sound principles to pay regard to that balance of inconvenience."

If, on the part of the Collector, there has been failure to give immediate notice of his award, and if the party interested in the award has suffered prejudice thereby, no doubt that party would be entitled to insist that the notice should have been "immediate." But what prejudice can a claimant suffer from the mere fact that the Collector has given him no immediate notice? Conceivably there can be none. So far as the period of limitation, provided for in clause (b) of the proviso to section 18, goes, it is made to run from the date of the receipt of the notice from the Collector, in which case it is six weeks, or from the date of the Collector's award, in which case it is six months, whichever period shall first expire. That means that in any case the proceedings shall be final after six months from the date of the award. This evidently contemplates that a party interested should not sit quiet, waiting for the Collector's notice or plead want of it, but should in any case himself be vigilant. The longer period of six months from the date of the award is given him as an alternative, where the Collector has not been himself prompt. The lateness of the notice cannot, therefore,

(1) (1880) 5 App. Cas. 820 at p. 827

affect the question of limitation, and no prejudice can possibly arise to the claimant in respect thereof.

If this consideration is borne in mind it becomes plain that sub-section (2) of section 12 provides that the Collector "shall give immediate notice" solely in the interests of the public with a view to ensure that the compulsory acquisition shall be in all respects facilitated and completed without delay. When that sub-section directs that the Collector shall give "immediate notice" it does not confer a right upon the person to such notice so as to entitle him to say that a late notice is bad, but it imposes a duty upon the Collector, in the interests of the public, to ensure prompt, vigorous action on his part for the speedy acquisition of the property and a speedy determination of all disputes.

And this construction of the said sub-section is supported by the exact position which the Collector occupies under the Act. As has been held by the Privy Council, adopting the view of the Calcutta High Court, in *Ezra's case*,⁽¹⁾ the Collector, making an award under the Act, is agent of the Government, and acts in his administrative capacity. If that is his position, as agent of the Government who represent the public, the Collector acts for the public. The compulsory acquisition of land being necessary for the public benefit, when the Legislature says that he shall give "immediate notice", it is intended that he shall act without delay and give immediate notice solely with a view to that benefit. If his notice is not immediate, it is the public that is inconvenienced; the hardship is upon them.

From these considerations it follows, in my opinion, that the word "notice" as used in clause (b) of the proviso to section 18 means notice, whether immediate or not. This construction brings all the material provisions into harmony with one another. The clause in question prescribes one of two periods of limitation for a party who has not accepted the Collector's award—either six weeks from the date of the receipt of the Collector's notice, whether immediate or not, or six months from the date of the award; *whichever period shall first expire*. These last words, which I have italicized, show that the element of notice

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(1) (1905) 32 C.L. 605; 7 Bom. L. R. 422.

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is an essential ingredient, so to say, of the two alternative periods, and such notice may be "immediate" or not.

Supposing, however, that the construction which the claimants in this case ask me to put on sub-section 2 of section 12 and clause (b) of section 18 is correct, and that the Collector was bound to give "immediate notice", the further question is, whether the Collector's notice here was not immediate because it was given five days after the award.

Now, the word "immediate" has been construed by a Full Bench of this Court, consisting of Nanabhai Haridas, Birdwood and Jardine, JJ., in *In re the Application of Sheshamma* ⁽¹⁾ to mean "as allowing a reasonable time for doing it." "The test," they say, "is, whether under the circumstances, there was such unreasonable delay as would be inconsistent with what is meant by 'immediate.'" In *The Queen v. Justices of Berkshire* ⁽²⁾, Cockburn, C. J., pointed out:—"It is impossible to lay down any hard and fast rule as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable time' and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case." In *Thompson v. Gibson* ⁽³⁾ it was held that the word "immediate" meant "with all convenient speed." In *Page v. Pearce*, ⁽⁴⁾ Lord Abinger said:—"When the Act says only that the Judge shall certify immediately after the trial, and does not more especially define the time, it must mean that it is sufficient if it be done within a reasonable time." And Alderson B. said:—"As it is to be assumed to be a reasonable and proper act *prima facie*, it is for the party who complains of it to show that he took an unreasonable time." The result of these and other authorities (see *Christie v. Richardson* ⁽⁵⁾ and *Raleigh v. Atkinson* ⁽⁶⁾) is that where a statute or a written contract provides that a certain

(1) (1887) 12 Bom. 276.

(2) (1878) 4 Q. B. D. 469 at p. 471.

(3) (1841) 8 M. & W. 281.

(4) (1841) 8 M. & W. 677 at p. 679.

(5) (1842) 10 M. & W. 688.

(6) (1840) 6 M. & W. 670 at p. 677.

thing shall be done immediately we must, in construing that word, have regard to the object of the statute or contract as the case may be, to the position of the parties, and the purpose for which the Legislature or the parties intend that it shall be done immediately. Applying that test here, what have we? The Collector, as a public functionary, has several duties to discharge: the duty of making awards and taking proceedings under the Land Acquisition Act is only one of them. The exigencies of official business require that he should have some time before he can give notice of his award after he has made it and there is no conceivable reason why a party interested in the Collector's award should have a notice *instantly*. Having regard to these circumstances I must decline to hold that the notice given here five days after the award had been made, was not immediate.

That brings me to the second contention of the claimants, in answer to the preliminary objection raised for the Government and the Municipality. The claimants urge that their attorneys' letter of the 7th of October 1901 sufficiently complied with the requirements of section 18 to bring this reference by the Collector within the period of limitation prescribed in clause (b) to the proviso of that section.

Now, section 18 provides that any person interested, who, having not accepted the award, desires to have an adjudication of the claim by the Court, should, within the period of limitation prescribed in the proviso to the section, do certain things. First, he must make a written application to the Collector. Secondly, that written application should require the Collector to refer the matter for the determination of the Court, whether the objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable or the apportionment of the compensation among the persons interested. Thirdly, such application shall state the grounds on which objection to the award is taken.

These are the conditions prescribed by the Act for the right of the party to a reference by the Collector to come into existence. They are the conditions to which the power of the Collector to

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make the reference is subject. They are also the conditions which must be fulfilled before the Court can have jurisdiction to entertain the reference.

Now, as was said by the Judicial Committee of the Privy Council in *Nasserwanjee Pestorjee v. Meer Mynooddeen Khan Wallud Meer Sudroodeen Khan Bahadoor*,⁽¹⁾ "wherever jurisdiction is given to a Court by an Act of Parliament, or by a Regulation in India (which has the same effect as an Act of Parliament), and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is a universal principle that these terms must be complied with, in order to create and raise the jurisdiction, for if they be not complied with the jurisdiction does not arise." The same case is also authority for the proposition that the compliance need only be substantial so as to be "intelligible and clear."

I turn now to the letter of the claimants' attorneys, dated the 7th October 1904, which is relied upon by them as meeting the requirements of section 18, to see whether its terms substantially comply with the conditions, subject to which alone the Collector had power to make this reference.

In the first place does it require the Collector to refer the matter for the Court's determination? The word "require" implies compulsion. It carries with it the idea that the written application should itself make it incumbent on the Collector to make a reference. What is there in the terms of this letter imposing upon him the duty to refer? It starts by saying that the award is not accepted and then proceeds as follows:—

"We will send you in due time a formal request to refer the matter for the determination of the High Court of Judicature at Bombay under section 18 of the Land Acquisition Act, 1894. In the meantime we have to request you to let us have a copy of the notes of your judgment."

Paraphrased into the plainest language and understood in their natural meaning, these words are only an intimation to the Collector of the claimants' intention or determination to require him thereafter to make the reference. True, they say such subsequent requirement or request will be formal. That, I think,

(1) (1855) 6 Moo. I. A. 131 at p. 155.

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means with due regard to the formalities prescribed in section 18. The question is, does this letter by itself require the Collector to make the reference? The test is this: What was the Collector to understand when he received this letter? Was he to understand, when he received it, that he was bound to act upon it and refer or rather that he should not act upon this letter but wait until another letter, written formally, *i. e.*, with due regard to the requirements of section 18, reaches him? The latter is, in my opinion, the plain meaning. Nor can it with any show of reason be urged that what the claimants' attorneys meant by this letter of the 7th of October was that, as the letter to follow was only to be formal, this letter was in substance one which met the requirements of section 18. That section prescribes certain formalities: and none of them, or at any rate not the most important of them, has been observed in this letter of the 7th of October. It is clear from the section that those formalities are matters of substance and their observance is a condition precedent to the Collector's power of reference.

First, there is no intimation in the letter whether the matter to be referred to the Court consists in an objection to the measurement of the land, the amount of the compensation, or the persons to whom it is payable. The Collector is left completely in the dark about it. It may be possible to gather from the terms of the letter, which refer to the death of the executrix and the survival of the two executors and express the willingness of the latter to receive under protest the compensation awarded by the Collector, that there was no dispute as to the persons to whom the compensation was payable. But what about the measurement of the land or the amount of compensation?

But even supposing the letter contained sufficient to enable the Collector to infer that the objection to the award was only that the compensation awarded by him was too low, because the claimants expressed their willingness to receive the award money "under protest," section 18 also requires that "the application shall state the grounds on which objection to the award is taken." Here no grounds are stated for the objection that the compensation awarded is too low.

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I am of opinion, therefore, that there was no substantial compliance by the claimants with the conditions for a reference, prescribed in section 18 of the Act; that the Collector had no power to make the reference and that it is *ultra vires*.

But, lastly, it is urged for the claimants that as the Divali holidays intervened they are entitled, under the provisions of the Indian Limitation Act, to a deduction of the time of those holidays from the six weeks' period of limitation. It is a moot question whether the provisions of the Limitation Act apply to the special period of limitation prescribed in section 18 of the Land Acquisition Act. This latter is a special Act and it would appear from a decision of this Court, in *Guracharya v. The President of the Belgaum Town Municipality*,⁽¹⁾ that the provisions of the Limitation Act apply to special Acts. The Madras High Court has taken a different view: see *Veeramma v. Abbiah*,⁽²⁾ *Girija Nath v. Patani*,⁽³⁾ *Nagendro v. Mathura*.⁽⁴⁾ The decision in *Guracharya v. The President of the Belgaum Town Municipality*⁽¹⁾ being a decision of a Division Bench of this Court is binding upon me sitting as a single judge. But even then how do the claimants bring their case within the relief afforded by the Limitation Act? It is undisputed that the Divali holidays in 1904 fell on the 7th and 8th of November. The period of six weeks from the receipt of the Collector's notice expired on Saturday the 5th of November 1904 and on that day the Collector's office was open. Even under the Limitation Act no deduction can be made under these circumstances. Then it was said that the time occupied by the claimants' attorneys in taking a copy of the Collector's judgment ought to be deducted from the six weeks. The answer to this is simple. The Land Acquisition Act mentions no such thing as a judgment of the Collector making an award under the Act. If the claimant objects to the award he ought to know why he objects: the Collector's reasons are not necessary for his objection. Further, section 12 of the Limitation Act, para. 4, which alone can possibly apply, speaks of a copy of the award

(1) (1884) 8 Bom. 529.

(2) (1893) 18 Mad. 99.

(3) (1889) 17 Cal. 263.

(4) (1891) 18 Cal. 368.

—not of the Collector's judgment—and the claimants here had a copy of it in the Collector's notice of the 23rd of September.

There was one point, which in the course of argument at the Bar, suggested itself to me and I thought then that it might be of some weight in support of the validity of the reference. That point was that the Collector, whose position under the Land Acquisition Act, as held by the Privy Council in *Ezra's case*, already referred to, is that of an agent of Government, having made the reference, must be regarded as having waived his right or the right of his principals, the Government, to dispute that the reference was unauthorised and therefore illegal. But I have more carefully weighed the point since and arrived at the conclusion that there is nothing in it. The Collector's authority to make the reference as an agent of Government is restricted by the statutory conditions prescribed in section 18. The claimants cannot plead ignorance of those conditions and the restricted nature of the Collector's authority. He cannot bind Government by stepping outside the limits of the power given by section 18. If he does step outside them, his action is illegal: and no waiver on his part can atone for the failure of the claimant to fulfil the statutory conditions which the law required them to fulfil before their right to require the Collector to make a reference could come into existence.

For all these reasons I am of opinion that the preliminary objection raised by the learned Advocate General, Mr. Raikes, is good and must be allowed. I dismiss the reference. No order as to costs.

Mr. E. F. Nicholson, Government Solicitor, for Government.

Messrs. Nann & Hormasji, Solicitors for claimants.

Messrs. Crawford, Brown & Co., Solicitors for Municipality.

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APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Batty.

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October 10.

YESA BIN RAMA BOLYA AND ANOTHER (ORIGINAL DEFENDANTS),
APPELLANTS, v. SAKHARAM GOPAL GANU (ORIGINAL PLAINTIFF),
RESPONDENT.*

*Khoti Act (Bombay Act I of 1880), sections 6, 7, 8, 9, 11 †—Khot—
Occupancy tenant—Mortgage by occupancy tenant—Forfeiture.*

* Second appeal No. 570 of 1904.

† The Khoti Act (Bombay Act I of 1880), sections 6, 7, 8, 9, 11 run as follows:—

6. If an occupancy-right which is not transferable otherwise than by inheritance, has been so transferred, the actual holder of the land shall be deemed to be the tenant thereof, and if he, or his father, or other person from whom he inherits, has occupied or cultivated the land continuously from any time previous to the commencement of the revenue year 1845-46, he shall have a right of occupancy therein:

Provided that, if the actual holder is in possession of the land as mortgagee or lessee merely, his occupation or cultivating shall, for the purpose of this section and of section 5, be deemed to be the occupation or cultivating of the mortgagor or lessor, and that, if such mortgagor or lessor has a right of occupancy in the land, such right shall, notwithstanding the provisions of section 9, be subject to the mortgage lien or lease of the said mortgagee or lessee until the same is duly discharged or determined.

7. Privileged occupants shall continue to hold their lands conditionally on the payment of the rent from time to time lawfully due by them to the khot or other person entitled to receive payment of the same.

8. Tenants other than occupancy tenants shall continue to hold their lands subject to such terms and conditions as may have been, or may hereafter be, agreed upon between the khot and themselves, and in the absence of any such specific agreement shall be held to be yearly tenants liable to pay rent to the khot at the same rents as are paid by occupancy tenants in the village in which the lands held by them are situate: Provided that the said rates shall not exceed the maxima prescribed in section 33, clause (c).

9. The rights of khots, dharekaris and quasi-dharekaris shall be heritable and transferable.

Occupancy-tenants' rights shall be heritable, but shall not be otherwise transferable, unless in any case the tenant proves that such right of transfer has been exercised in respect of the land in his occupancy, independently of the consent of the khot, at some time within the period of 30 years next previous to the commencement of the revenue year 1865-66, or, unless in the case of an occupancy-right conferred by the khot under section 11, the khot grants such right of transfer of the same.

11. It shall be competent to the khot at any time to confer on any tenant the right of a privileged occupant of any class, or on a privileged occupant of one class, the right of a privileged occupant of a superior class: Provided that the grant by the khot of any such right shall not affect any right of Government in respect of the land which is the subject of such grant or of the trees or other forest-produce of such land.

There is no authority for saying that an occupancy tenant, whose tenancy is not determined, forfeits his tenancy by parting temporarily with the possession of his land to another without resigning the land as completely as would be necessary, in the case of privileged occupants of another sub-class, to place the land at the disposal of the khot. And so long as his tenancy is not determined, the land is not at the disposal of the khot. And the khot cannot claim to treat the person in possession, under a right derived from the occupancy tenant, either as a trespasser or even as a yearly tenant, so long as the privileged occupant's rights remain undetermined by resignation, lapse or duly certified forfeiture.

SECOND appeal from the decision of Mahadeo Shridhar Kulkarni, First Class Subordinate Judge, A. P., at Ratnagiri, confirming the decree passed by J. N. Kale, Subordinate Judge of Sangameshvar, at Deorukh.

Suit to recover possession of land by a khot from the occupancy tenant.

The lands in dispute were situate at Wasi, a khoti village, and stood in Government records in Yesa's (defendant No. 1's) name as his cultivatory holding or occupancy tenancies. Sakharam Gopal Ganu (plaintiff) owned an anna share in the khoti : his share was partitioned off and was designated as Dhada No. 4. The plaint lands were comprised in the plaintiff's Dhada ; and he was therefore entitled to all the rights possessed and enjoyed by a khot under the Khoti Act (Bombay Act I of 1880) in respect to lands held by occupancy tenants.

In 1900 Yesa borrowed Rs. 15 from the plaintiff and hypothecated to him a moiety of the plaint lands by a deed (Exhibit 11). Again on the 6th January 1902, in consideration of the debt due under Exhibit 11 and for a fresh advance of Rs. 29, Yesa hypothecated to the plaintiff the whole of the disputed lands by a registered deed (Exhibit 12) for Rs. 44. In the latter deed Yesa covenanted to deliver possession of the lands to plaintiff in case of the default in payment of debt within the time stipulated for repayment of the loan, *viz.*, three years. The deed also contained a covenant for realisation of the amount by sale of the hypothecated property.

But within 4 months of the date of Exhibit 12 Yesa mortgaged the plaint lands to defendant No. 2, by a registered deed (Exhibit 15) dated the 20th of April 1902, and put the mortgagee in actual possession. The consideration for this mortgage was Rs. 100

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made up of Rs. 5 paid in cash and Rs. 95 being the amount of antecedent debt. The mortgagee was to pay the khot's dues.

The plaintiff, as a landlord khot, brought the present suit for possession of the lands on the ground that Yesa by his own conduct lost his occupancy rights, and that the mortgage-deed (Exhibit 15) could not transfer any valid right to defendant No. 2 as against the plaintiff. He prayed for recovery of possession of the lands from defendant No. 2.

It was contended on behalf of defendant No. 2 that the plaintiff granted the defendant No. 1 the right to mortgage the lands; that accordingly the latter mortgaged the land to him with possession, and the plaintiff had no right to complain about it; and that as defendant No. 1 got from the plaintiff himself the right which he did not originally possess, he was free to mortgage the lands to anybody.

The Court of first instance found that the plaintiff did not grant to Yesa (defendant No. 1) the right to transfer the lands in dispute; that the mortgage-deed (Exhibit 15) executed in favour of defendant No. 2 by defendant No. 1 was not passed with the plaintiff's consent and knowledge; that the plaintiff was not estopped from complaining about the mortgage-deed (Exhibit 15); and that the occupancy rights of defendant No. 1 in the lands had become extinguished and the plaintiff was entitled to claim possession thereof.

On appeal, these findings were confirmed by the lower appellate Court.

The defendants appealed to the High Court.

The appeal came up for disposal before Russell and Aston, JJ., when their Lordships sent down issues to the lower Court and wrote the following interlocutory judgment:

"We think, having regard to the unsatisfactory state of evidence in this case, that we must remand it to the lower Court to find (1) whether the plaintiff had such knowledge of the mortgage to defendant 2 as to raise an estoppel against him (the plaintiff); (2) whether the conduct of the plaintiff in any and what respect was such as to induce defendant 2 to believe that the right of transfer was conceded to defendant 1 or that plaintiff waived his right to object to such transfer."

The lower appellate Court found both these issues in the negative.

The appeal then came up for disposal before Russell and Batty, JJ.

M. R. Bodas for the appellants (defendants):—The lower Court having decided the question of estoppel in favour of plaintiff, this Court has now to consider the remaining two questions, *viz.*, whether section 6 of the Khoti Act (Bom. Act I of 1380) does not entitle a mortgagee to retain possession until at least his lien for the mortgage amount is discharged, and secondly, even if the mortgage is invalid the plaintiff khot can forfeit the land except under the circumstances specified in section 10 of the Khoti Act. We say that section 9 must be construed in conformity with section 6. The first clause of section 6 distinguishes between an actual holder and a holder who has occupied the land continuously from before 1845-46. The latter is given the occupancy right, while the former would be an ordinary tenant, who too cannot be evicted without proper notice. Clause 2 of the same section further lays down that if the actual holder happens to be a mortgagee or lessee, or if his mortgagor is an occupancy tenant, he shall have a lien on the land until the mortgage debt is discharged. If the mortgage is invalid the mortgagee may be prevented from recovering possession, but he cannot be ousted if already in possession, at least so long as his mortgagor or the real occupancy tenant has no objection. The mortgagee has a right to retain possession until his lien for the mortgage amount is discharged. At the most he can be said to be in possession as an agent or on behalf of the occupancy tenant, and so long as the occupancy is not forfeited he cannot be ousted. In Bengal it has been held that a ryot having a right of occupancy cannot be evicted merely because he asserts a right of transfer or sells his right without giving up possession: *Srishteedhur Biswas v. Mudan Sirdar*⁽¹⁾. As for forfeiture, section 10 authorizes it only when the privileged occupant resigns the land, dies without heirs or fails to pay the rent. The section does not apply to a transfer by mortgage, because in that case the

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occupant does not resign the land or give up all his rights. The equity still remains with him. He may forfeit his tenancy, only in case of complete alienation such as sale: see *Nagardas v. Gannu*⁽¹⁾. In case of a temporary transfer of possession there is no such resignation and hence there can be no forfeiture. The tenant still retains his occupancy right and the mortgagee may be said to cultivate the land on his behalf. The objection that if section 6 is interpreted in this way, section 9 is rendered practically ineffective in cases of mortgages, is clearly groundless, because the section is intended to protect the khot against being saddled with an undesirable occupancy tenant for ever. Temporary transfer or sub-leases affect him in no way and are not meant to be barred. The argument that section 6 applies to mortgages before 1845 A. D., or at least before 1880 A. D. when the Khoti Act came into operation, is also not tenable, because that is going against the plain meaning of the section, and importing things into the Act which are not expressly provided.

D. A. Khare for the respondent (plaintiff):—The khot is entitled to forfeit and recover possession of the land under section 9 of the Khoti Act. Section 6 of the Act applies only to mortgages before 1845, or at the most to mortgages before the Khoti Act came into operation. To apply it to all mortgages would be practically to nullify section 9 so far as mortgages are concerned and thus defeat the object of legislature. The khot has a right to prevent a stranger stepping into the occupancy of the land without his consent. If a person advances money on land which cannot be mortgaged, he does so at his own risk. If a tenant transfers the occupancy against the express conditions of his tenancy, he is liable to forfeiture for breach of condition and the landlord can evict any trespasser who may be found on the land. The tenant by mortgaging the land resigns his occupancy and is therefore liable to forfeiture.

BATTY, J.:—In this appeal the question for decision is whether the respondent, being a separated sharer in the Khotki of Wasi, is entitled to recover possession of certain land in which the first

(1) (1891) P. J. p. 107.

defendant had admittedly occupancy rights, but which that defendant had mortgaged with possession to the 2nd defendant.

Both the lower Courts found that the 1st defendant had no right of transfer in respect of the land in question.

But in second appeal to this Court, questions were raised as to whether the plaintiff had in any way estopped himself from disputing the validity of the mortgage, and the case was remanded to the lower Court for findings on the questions so raised.

The lower Appellate Court has found on the issues formulated in the negative and in favour of the plaintiff.

On the return of these findings, the 2nd defendant, the mortgagee-appellant, reverted to other questions of law left undecided at the time when the interlocutory order of this Court was issued.

A decision on those questions would not have been necessary, had it been found that the plaintiff was estopped from disputing the mortgage. They revive in consequence of the issues of fact having been determined in the plaintiff's favour.

These further questions, which Mr. Bodas now urges on behalf of the mortgagee, were raised in grounds 6, 7 and 8 of the memo. of appeal to this Court, which run as follows:—

6. Apart from the question of alienability, the plaintiff has no right to claim possession of the lands by forfeiture.

7. The lower Courts erred in finding that the lands were forfeited and the reasons given to support the finding are wrong and mutually contradictory.

8. The lower Court erred in ignoring the provision in section 6 of the Khoti Act of 1880.

Mr. Bodas urges that, under section 6 of the Khoti Act, 1880, his client as a mortgagee in possession is entitled to remain in occupation and cultivation of the land, and to have his occupation and cultivation deemed the occupation and cultivation of the mortgagor, the occupancy tenant, and that the occupancy right is subject to the lien of the mortgagee, until the same is duly discharged. And he further urges that no power is given by the Act to the Khot to resume or recover possession of the land, save in the events specified in section 10 of that Act, none of which he contends have yet happened.

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The Honourable Mr. Khare on the other hand, on behalf of the Khot respondent, contends that if section 6 is to be construed as applying to such a case as the present, the result would be to render the provisions of section 9, prohibiting transfer, practically inoperative in the case of mortgages and leases—a result which, he urges, could not have been intended by the legislature. The alternative construction of section 6 which he suggests is that its operation is limited to cases arising for decision at the commencement of a survey settlement, similar to those with which section 5 deals, that is, as to rights acquired by continuous possession dating back from a time previous to 1845, and found to exist at date of the settlement. It was, however, pointed out that the first part of section 6 and the proviso to the section are alike silent as to possession prior to 1845, and that if the section were only applicable at each successive settlement, the rights of mortgagees and lessees thereunder would depend on the mere contingency of their subsisting in the particular year of a settlement, a result which could hardly have been seriously intended. The Honourable Mr. Khare then somewhat modified his contention and argued that such privileges conferred on mortgagees and lessees of non-transferable rights, were limited to transferees in possession at the date when the Act came into force: that the phrase “has been so transferred” indicates that only such transfers as had already been effected, were in contemplation: and that transfers, subsequently made, were left to the operation of section 9. The mortgagee in this case took therefore no title by the transfer and is, Mr. Khare contends, a mere trespasser, and the Khot as superior holder can eject him.

Several cases were cited in argument, but admittedly none of them turn upon the construction of section 6 *et seq.* of the Act.

The discussion of any considerations which they may suggest by analogy or with reference to general principles, must be postponed to a study of the particular enactment which governs this case.

The Act (Bombay Act I of 1880), as indicated in the preamble and in section 1 defining its extent, deals with villages held by Khots. But its interpretation clauses (section 3) mention another class of land-holders designated privileged occupants.

This class consists of three sub-divisions. The first two are not tenants of the Khot. The third sub-division, with which alone we are concerned in this case, consists of occupancy tenants who hold Khoti land with a right of occupancy, which right is common to all three sub-divisions. Their respective liabilities for rent are set forth in section 33 and their other liabilities in section 36.

The privilege common to the class and distinctive of it as a whole, is declared in section 7, and consists of the right to hold land conditionally on payment of rent lawfully due thereon. The circumstances by which the privilege is acquired and ascertained, are laid down in sections 5, 6 and 11. All these 3 sub-divisions are within the definition, in section 3 (14) of the Bombay Land Revenue Code, 1879, of inferior holders, and are included accordingly in those provisions of Part II of the Khoti Act which appear under the heading of inferior holders. Those provisions deal also with another class of inferior holders, separately treated in section 8 as tenants other than occupancy tenants. These are designated in the marginal note to that section as ordinary tenants. The essential distinctions between the two main classes, privileged occupants and ordinary tenants, are to be found in sections 7 and 8. Those sections show that while in the first class (viz., privileged occupants) the continuance of the tenure is dependent solely on the fulfilment of obligations defined by and ascertained under the Act, the second class of ordinary tenants are subject to terms settled by agreement or, in the absence of agreement, have only a yearly tenancy, on rents determined, subject to a specified maximum, by local usage. The last class of ordinary tenants come within the provisions of section 84 of the Bombay Land Revenue Code, 1879, and their holdings are terminable, therefore, by the three months' notice therein prescribed.

These very familiar and obvious distinctions, it is essential to bear in mind in applying the provisions of sections 9 and 6 to questions relating to the transfer of rights by inferior holders. The necessity for stating them at length, arises from the fact that they seem to have been overlooked in the lower Courts. Section 9 declares that the rights of the first two sub-divisions of

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privileged occupants (Dhārekaries and quasi-Dhārekaries) are both heritable and transferable.

As to the third sub-division, that of occupancy tenants, the language of the Act requires careful consideration with reference to the foregoing distinctions.

It lays down that occupancy tenants' rights shall not be transferable otherwise than by inheritance, unless the right of transfer is established by circumstances found to have no existence in the present case. Those rights, as above shown, are the security of tenure on payment of statutory rent, which exempts them from liability (1) to enhanced rent and (2) to a determination of tenancy, by efflux of time or on notice given.

It is these rights of exemption alone which section 9 declares to be non-transferable, save by inheritance.

The section is silent as to the rights of the second class of inferior holders, viz., ordinary tenants. That is to say, it does not declare their tenancy rights to be equally non-transferable.

In the absence of any provision, there is no reason why the ordinary tenancy rights should not be transferable. That they are transferable has indeed been judicially decided in *Sonshet Antushet Teli v. Vishnu Babaji Johari*⁽¹⁾.

The prohibition then is only as to the transfer of the occupancy right distinctive of an occupancy tenant, and leaves untouched the right of ordinary tenancy.

There is no prohibition to disable an occupancy tenant from conferring on another any rights which fall short of the occupancy right. The occupancy tenant can therefore, without infringing section 9, allow another to enjoy such of his rights as involve no transfer of the permanent occupancy on the statutory rental. What he cannot give is his immunity from enhancement and ejectment on 3 months' notice. Any attempt to transfer that is null and void. The transferee would, by section 9, be prevented from insisting on the transfer as conferring any such right on him as against the Khot.

This is recognized in the case above cited, where it was said: "In the case of an ordinary tenancy the Khot can at any time

(1) (1894) 20 Bom. 78.

get rid of the tenant by giving him notice : whereas if a transfer of an occupancy tenancy could be carried out against his wishes, he might be provided with a tenant whom he did not like and could not eject." A further reason for not recognizing the right of an occupancy tenant to alienate his special privilege is this, that it would prejudice the Khot's reversionary interest. For on the resignation by an occupancy tenant the land resigned is at the disposal of the Khot.

But there is no reason for supposing that an occupancy tenant has less power of alienation than an ordinary tenant. And therefore the transferee from an occupancy tenant would at the very least be entitled to claim that he had by the transfer obtained such rights as every ordinary tenant could give. But no ordinary tenancy, even in the absence of specific agreement, being terminable without the notice required by section 84 of the Bombay Land Revenue Code, the transferee from a tenant could in any case insist on the benefit of that provision. It is not in the present case alleged that any such notice has been given by the plaintiff to the 2nd defendant. The plaintiff claims to eject the 2nd defendant as a mere trespasser, without any notice whatever. But the 2nd defendant is not a trespasser coming in without any colour of any legal right. He is at the least entitled to rely upon the right of a yearly tenant to notice, which right nothing in section 9 prevented the 1st defendant as occupancy tenant from conferring on him.

If the premises above set forth be correct, the occupancy tenant, defendant 1, could, so far as section 9 is concerned, confer on defendant 2 all his own rights short of an occupancy tenant's rights.

But the plaint alleges that "by reason of the unauthorized and illegal transfer, the occupancy rights of defendant 1 were put an end to."

There is nothing in section 9 which entails this consequence. And it is necessary, therefore, to consult the other provisions of the Act in order to see whether this consequence follows. The only other sections relating to the determination of an occupancy tenancy are sections 7 and 10. The first of these declares the continuance of the tenancy to be conditional upon payment of

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the rent from time to time lawfully due. There is no allegation in the plaint of any default made in the fulfilment by the defendant 1 of this condition. The other section (section 10) declares the land of a privileged occupant to be at the disposal of the Khot on the happening of one or other of three events therein specified, viz., resignation, lapse from failure of heirs or others entitled, and forfeiture certified by the Collector on failure to pay rent.

The plaint does not allege any one of these events to have happened.

The plaint alleges transfer of possession, it is true. But there is no reason for supposing that transfer of possession is the same thing as resignation in the case of a privileged occupant any more than it would be in the case of an ordinary tenant. The case of *Sonushet*, above cited, shows that transfer of possession would not, of itself, operate as a surrender in the case of an ordinary tenancy otherwise undetermined.

The word 'resignation' is not defined in the Act. Its ordinary use as a legal term would imply the returning a fee by a vassal into the hands of a superior. There is no reason to suppose that it was intended to include such temporary relinquishment of personal cultivation in favour of another as might be made under section 74 of the Bombay Land Revenue Code, a section which indeed is not applicable (section 39 of Bombay Act I of 1880) to Khoti villages. For the phrase is used in section 10 in connection with all three sub-divisions of the class of privileged occupants, and the first two classes can indisputably transfer possession temporarily and even permanently without the land being thereby placed at the disposal of the Khot. The first defendant, so far from resigning, claims the right to hold the land at his own disposal, with power reserved to resume the actual possession.

It has been suggested that the transfer worked a forfeiture as a breach of the conditions of the tenure. But the only breach of the conditions declared in the Act to have that effect is failure to pay the rent, and even that must be followed by the Collector's certificate.

The Act attaches no consequence to a prohibited transfer but merely renders it abortive, null and void. It does not annihilate

the occupancy-tenants' rights. And unless they are otherwise determined therefore, the land is not at the disposal of the Khot, and he has no right under sections 7, 9 and 10 to maintain any objection except this, that the transferee cannot claim for himself any permanent tenure on the fixed statutory rent.

If the 2nd defendant, the mortgagee, depended solely on the transfer from the 1st defendant, the occupancy tenant, of the occupancy rights, he would necessarily fail under the provisions of section 9. And this would be the case if the rights of the 1st defendant were determined on the happening of any of the events specified in section 10. But as long as those rights continue, the 1st defendant is not prevented by anything in section 9 or any other provision of the Act from disposing, at his will, of any rights which he possesses other than those occupancy rights which are conferred by section 7. Thus, as decided in the case of *Sonshet v. Vishnu* above cited, he can, as long as his own tenancy is undetermined, grant to another the right which is in him, but he cannot give a right which would survive his own interest, so as to force upon the Khot a tenant claiming in his own right a permanent occupancy as against the Khot, surviving after the rights of the transferor had determined. Section 11 reserves to the Khot alone the power to confer such rights upon tenants. But no provision of the Act prevents any tenant of any class from allowing another person to cultivate in his stead or to take the profits of such cultivation as long as the tenancy subsists. The line is drawn only at the transfer of perpetual tenant rights at fixed rents by occupancy tenants who have not acquired the right of transfer under section 9 or section 11.

Thus apart from section 6 it appears to us, the mere occupation or cultivating of non-transferable land by a person who is not a tenant of the Khot, is insufficient to place such land at the disposal of the Khot, if the occupation and cultivating be in the exercise of a right derived from any tenant whose tenancy is still subsisting, and it would be but a question of academic interest to determine whether in section 6 the legislature intended only to provide for cases existing at date of the Act. For no other consequences would in the present case result from holding

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that the rights of the parties were governed only by the other sections of the Act. Had section 6 been intended, however, to apply only to the state of things existing when the Act came into force, it would be reasonable to suppose that in lieu of the phrase "has been so transferred" some such phrase would have been employed as "has before the coming into force of this Act been so transferred." Moreover, the reference to the provisions of section 9 in the last paragraph of section 6, suggests that future mortgages and leases were in contemplation. The first part of the section manifestly contemplates cases not being cases of mortgages or leases, in which the occupancy right no longer subsists in the person originally entitled thereto, and consequently the transferee having no right in the transferor to fall back upon, would not even be an ordinary tenant but for the special provision in the first sentence of the section. Hereditary occupation by such a transferee is there declared to confer occupancy rights only if dating from a time previous to 1845. The proviso in removing all doubt as to the right to occupation by a mortgagee or lessee, whose mortgagor's or lessor's tenancy is still subsisting, appears to have been deemed necessary to make it clear that the transferor could not repudiate the transfer in such cases as one beyond his powers as restricted by section 9. It does not validate, however, the survival of occupancy rights after the extinction of the transferor's tenancy. For they would then be extinguished by section 10. It only declares that the lien or lease shall subsist so long as the occupancy rights of the transferor continue. There is nothing that suggests that these provisions only apply to mortgages and leases subsisting when the Act came into force. Had it been intended that subsequent mortgages and leases should work a forfeiture in favour of the Khot, that intention would, we think, have been clearly expressed. Moreover, such an intention would obviously be liable to frustration, as nothing could prevent an occupancy tenant from giving to another all the profits of the land which a mortgagee could enjoy.

To deal briefly with the cases cited in argument, *Abblakh Rai v. Udis*⁽¹⁾ turns on the language of a local Act and relates only

(1) (1877) 1. All. 353.

to transfer by sale in execution of decree. *Narendra v. Ishan*⁽¹⁾ deals with a section of a Bengal Act and a different tenure. The transferor in that instance had abandoned the land after a sale in execution. The basis of the decision was the complete abandonment by out-and-out sale and it was recognized that sub-letting was allowable and did not determine the occupancy right (page 289). *Srishteedhur v. Mudan*⁽²⁾ turns on the same principle that the entire abandonment by out-and-out sale with possession transferred, determines all occupancy rights where they are not transferable, but a sale asserting a transferable right unaccompanied by transfer of possession was held not to entail liability to ejection. *Bhiram Ali v. Gopi*⁽³⁾ also deals with the Bengal Tenancy Act, and relates to a sale, which necessarily involves the determination of all occupancy rights in the person whose interest is sold.

Of the Bombay cases *Purushottam v. Kashidas*⁽⁴⁾ is one in which the occupancy right had been declared by the Collector to be forfeited, so that section 10 of the Act applied, and extinguished all pre-existing rights. That case followed *Nagaridas v. Ganu*⁽⁵⁾ in which the tenant had sold out-and-out, relinquishing possession, and thus had determined his tenancy altogether.

In *Dattatraya v. Nilu*⁽⁶⁾ all the cases above cited were considered, and section 9 was held to invalidate execution sales of occupancy rights as property over which or the profits of which the judgment-debtor had no disposing power which he could exercise for his own benefit. This clearly does not affect the transfer of rights not extending to the non-transferable privilege of permanent occupancy on a statutory rent. The case of *Sonshet v. Vishnu*⁽⁷⁾ has already been discussed as showing that a transfer of a right to an ordinary tenancy is not prohibited—a doctrine in accordance with *Narendra v. Ishan* (*vide supra*). The result is that there is no authority for saying that an occupancy tenant, whose tenancy is not determined, forfeits his tenancy by parting temporarily with the possession of his land

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(1) (1874) 13 Beng. L. R. 274.

(4) (1892) 17 Bom. 677.

(2) (1883) 9 Cal. 648.

(5) (1891) P. J. p. 107.

(3) (1897) 24 Cal. 355.

(6) (1898) P. J. p. 378.

(7) (1894) 20 Bom. 78.

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to another without resigning the land as completely as would be necessary, in the case of privileged occupants of another subclass, to place the land at the disposal of the Khot.

And so long as his tenancy is not determined, the land is not at the disposal of the Khot. And the Khot cannot claim to treat the person in possession under a right derived from the occupancy tenant, either as a trespasser or even as a yearly tenant, so long as the privileged occupant's rights remain undetermined by resignation, lapse or duly certified forfeiture.

The utmost, therefore, to which the plaintiff Khot is in this case entitled, is, we think, a declaration that no occupancy tenant's rights in the land in question have been transferred by the first defendant to the second defendant. In the circumstances of this case, we think both parties having failed to establish their contentions to the full, we should leave the parties to bear their own costs.

Decree accordingly.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar.

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ABDOOL HOSEIN MULLA AND ANOTHER, PLAINTIFFS, v. GOOLAM
HOSEIN ALLY AND ANOTHER, DEFENDANTS.*

Indian Registration Act (III of 1877), secs. 17, 18 clauses (d) and (f), 21, 24 and 77—Transfer of Property Act (IV of 1882), secs. 6, 19 and 21—Indian Succession Act (X of 1865), sec. 107—Document whereby a Mahomedan daughter relinquished her right of inheritance to her father's property—Registration—Refusal to register on the ground that the document did not contain sufficient description of property—Discretion of Registrar—Jurisdiction of Civil Court—Vested or contingent interest—Spes successionis—Alteration not affecting the legal effect of the contract.

A Mahomedan daughter executed in favour of her father a document under which, in consideration of her receiving Rs. 9,000, she relinquished her right of inheritance to the father's property and also to certain ornaments directed to be given to her by her mother. The document was presented for registration to the Sub-Registrar, who accepted the registration fee, which was endorsed on the document, and subsequently refused to register the document on the ground

* Original Suit No. 460 of 1905.

that its execution was denied and that it did not contain sufficient description of the immoveable property to which it related—sections 35 and 21 of the Registration Act (III of 1877). On appeal to the Registrar, he held that the execution of the document was proved, but refused registration on the ground that the provisions of section 21 had not been complied with. Thereupon a suit having been filed under section 77 of the Registration Act (III of 1877) for a decree directing registration of the document,

Held, allowing the claim, that section 21 of the Registration Act (III of 1877) did not apply. The document could not be treated as relating to property because it related to mere heirship : much less could it relate to immoveable property capable of being described and identified. Supposing that section 21 was applicable and that the document related to immoveable property, then the conditions of the section were satisfied, because under the document the executant gave up her right of inheritance to such of her father's immoveable property as he might leave on his death, and that this is not only a sufficient but the only description that could be given of the property.

Held, further, that the document did not fall within the category of any of the documents mentioned in section 17 of the Registration Act (III of 1877). It fell within clauses (d) and (f) of section 18 of the Act. It fell within clause (d) of section 18 because there was a release by the executant of her right to certain ornaments to which she had a present right. It fell within clause (f) because it was a document under which the executant agreed to release her right as heir to her father and that belonged to a class of documents not mentioned in section 17 and not falling within the preceding clauses of section 18.

Where a Sub-Registrar or Registrar receives a document and the registration fee, and endorses the payment on the document and issues a commission for taking evidence, he must be regarded as having exercised his discretion under section 21 of the Registration Act (III of 1877) and accepted the document for registration. But even if there was at first no acceptance under that section, that being a matter in his discretion, the Court cannot, under section 77 of the Act, question the subsequent exercise of such discretion. The discretion under section 21 arises where a non-testamentary document "relates to immoveable property". Where it does not so relate, the section cannot apply and the discretion cannot arise. It is open for a Civil Court to inquire into such question in a suit under section 77 of the Act.

The right of a son or daughter or other heir of a person to inherit his property is not an estate in remainder or in reversion in immoveable property or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent right. It does not come within the definitions of "a vested interest" in section 19 of the Transfer of Property Act (IV of 1882), or of "a contingent interest" in section 21 of the Act and section 107 of the Indian Succession Act (X of 1865). So far from being a vested or a contingent right, or a right in present or in future, it is, in the language of clause (a) of section 6 of the Trans-

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fer of Property Act (IV of 1832), "the chance of an heir-apparent succeeding to an estate," or "a mere possibility" of succession which cannot be transferred.

A mere *spes successionis* is unknown to, and not recognized by, Mahomedan Law.

An alteration to be material for the purpose of registration must affect the legal effect of the contract so as to make it cease to be the same instrument.

ONE Kalimuddin Amiruddin, who was a resident of Cambay, outside British India, was possessed of considerable immoveable properties both at Bombay and Cambay. He died on the 25th June 1900, leaving him surviving two sons, Abdool Husein Mulla and Abdullabhai Mulla, and a daughter Fatmaboo. Before the death of Kalimuddin, Fatmaboo, by a document dated the 25th October 1895, in consideration of Rs. 9,000 to be paid to her by Kalimuddin, renounced and released in his favour all her claims to the estate of the said Kalimuddin, moveable and immoveable, and also all her claims to certain ornaments which had been directed to be given to her by her mother, and she agreed by the said writing that, subject to her claim for the said sum of Rs. 9,000, Kalimuddin was at liberty to give his property to his other heirs. The document ran as follows:—

To Mulla Kalimuddin Amiruddin, residing at Horward in Cambay. Written by Fatmaboo Kalimuddin, wife of Gulam Hoosein Abdulla, residing as aforesaid. To wit: you are my father. Besides myself you have two sons. As to whatever immoveable and moveable property (and) effects there are belonging to you at Cambay, Bombay and Bakkha and Bassein and other places, and the same being hereafter increased or decreased during your life-time, as to what properties there may be at your death therein I have a share by way of inheritance according to the Mahomedan Law. And my mother directed (certain) ornaments to be given (to me). You having by the following agreement agreed to give me Rs. 9,000, namely, nine thousand of the Bombay currency in lieu of (or for) my whole share including that claim, have from this day credited (the same) to my account. Therefore I relinquish all my right (or) claim in respect of that *ra-kam* (sum of money) and give this release in writing and acknowledge that I have no right or claim at all to whatever property there may be at your death in this or in any other country (i.e.), wherever (the same may be) situated. Having fixed only the abovementioned sum in respect of all my rights I have caused (the same) to be credited and I am to take only that under the following agreement.

* * * * *

You can give your heirs your property along with the burden of the moneys mentioned in the above release, that is to say, whoever may become your heirs

are to enjoy your property after discharging the burden of the abovementioned sum, that is to say, your heirs the persons taking your property are bound to pay the abovementioned sum.

The said document was executed at Cambay and remained there until December 1904.

Fatmaboo during the life-time of her father and also after his death insisted on the performance of the aforesaid agreement and exacted payments from the deceased, and after his death from her brothers, to the extent of Rs. 4,651-7-0, but she subsequently repudiated the said transaction and filed a suit, No. 830 of 1904, in the High Court of Bombay against her brothers for a share in the estate of the deceased, relying on the fact that the said document had not been registered. Her brothers (defendants in the said suit) brought the said document to Bombay in December 1904, and on the 12th January 1905 they presented it for registration in the office of the Sub-Registrar of Bombay, who accepted it on receipt of the registration fee which was endorsed on the document. As the said document did not contain a full description of the immoveable properties left by the deceased Kalimuddin, a description of those properties was added to it in the form of a schedule before the document was lodged for registration. The Sub-Registrar issued a commission to take the evidence of Fatmaboo at Cambay, but in the meanwhile she having come to Bombay the commission was returned unexecuted. The Sub-Registrar, thereupon, refused registration on the ground that the non-appearance of Fatmaboo amounted to a denial of the execution of the document, and that the document did not comply with the requirements of section 21 of the Registration Act, inasmuch as it did not contain a description of immoveable property sufficient to identify the same. Fatmaboo's brothers, thereupon, appealed to the Registrar, who ordered the commission to re-issue to Cambay for the examination of Fatmaboo, but she did not attend the commission and died on the 25th April 1905, leaving her surviving her husband Goolam Hoosein and her son Shamsuddin Goolam Hoosein, her heirs according to Mahomedan Law. The last named two persons were examined before the commission and they denied knowledge of the execution of the document by Fatmaboo and stated that the schedule thereto was

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added after the alleged execution. The question of the registration of the document then came before the Registrar, who, after hearing the parties, refused to register it on the ground that it did not comply with the provisions of section 21 of the Registration Act. The plaintiffs, thereupon, brought the present suit against Goolam Hoosein and his son Shamsuddin praying, *inter alia*, that it may be ordered that the said document may be registered in the office of the Sub-Registrar or Registrar within thirty days of the passing of the decree in the suit.

The defendants answered that they had no personal knowledge of the execution by Fatmaboo of the document in suit; that the document did not remain at Cambay as alleged in the plaint and it was brought to Bombay on several occasions before December 1904; that it was void and inoperative and, therefore, not binding on the defendants; that the plaintiffs tampered with the document by subsequently adding to it a schedule of the property; and that under the circumstances of the case the registration of the document was properly refused.

Raikes with *Strangman* appeared for the plaintiffs.

Scott (Advocate General) with *Davar* appeared for the defendants.

CHANDAVARKAR, J. :—This is a suit brought by the two plaintiffs, Abdool Hoosein Mulla Kalimuddin and his brother, Abdulla-bhai, under section 77 of the Indian Registration Act, for a decree directing a Gujarathi document, alleged to have been executed by their sister Fatmaboo on the 25th of October 1895 at Cambay, to be registered in the office of the Sub-Registrar of Bombay, the Registrar having refused to order its registration.

Fatmaboo having died, the suit has been brought against her husband and son, the first and the second defendant respectively.

The plaintiffs' father, Kalimuddin, was a resident of Cambay outside British India but he owned several immoveable properties in Bombay as well as in Cambay. It is alleged by the plaintiffs that, on the 25th of October 1895, their sister Fatmaboo executed in favour of their father and themselves a Gujarathi

writing, whereby she relinquished her right of inheritance to the father's property in consideration of receiving from him a sum of Rs. 9,000; that the said document remained at Cambay from the date of execution until December 1904, when for the first time it was brought to Bombay in consequence of Fatmaboo having filed against the plaintiffs Suit No. 830 of 1904 in this Court; that the plaintiffs, having been then advised that it required registration, presented it for registration at the Sub-Registrar's office on the 12th of January 1905; that on the 23rd of June 1905 the Sub-Registrar refused registration; and that they then appealed to the Registrar, who, however, upheld the Sub-Registrar's order on the 23rd of June 1905.

The defendants in their written statement plead, *inter alia*, that the document was brought to Bombay several times before December 1904; they deny personal knowledge of its execution by Fatmaboo; they allege that, before presentation to the Sub-Registrar, the plaintiffs materially altered the document by adding to it a schedule containing a description of the property which the document purported to affect.

The first question in the suit—whether the document, which is marked Ex. C, was executed by Fatmaboo—ceased at the outset of the trial to be a point in controversy between the parties. The learned Advocate General, for the defendants, admitted the execution of the document except the schedule to it appearing as a footnote. Mr. Raikes, for the plaintiffs, on the other hand, admitted that Fatmaboo had nothing to do with the schedule, and that it had been inserted by the first plaintiff just before the presentation of the document for registration. What in law is the effect of this insertion on the question of registration is one of the points raised in the suit and that I will deal with presently. In the meantime I record my finding on the first issue in these terms:—The document mentioned in the plaint, except the schedule containing a description of the property, was executed by Fatmaboo.

That brings me to the next question, whether or not the document was, as required by clause (b) of section 25 of the Indian Registration Act, presented for registration “within four months after its arrival in British India.”

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Mr. Raikes, for the plaintiffs, has urged that, having regard to the fact that both the Sub-Registrar and the Registrar were satisfied upon the evidence before them that the document had first arrived in British India within four months of its presentation, the Court ought to start with a presumption in favour of the plaintiffs in that respect and hold to it unless the defendants rebutted it by satisfactory evidence. Having regard to the decision of Farran, C. J., and Strachey, J., in *Tullockchand v. Gokulbhoy*⁽¹⁾, Mr. Raikes might have gone further and urged that where once a Sub-Registrar or Registrar has exercised his discretion under section 24 of the Act and accepted a document for registration, though subsequently he refuses to register it, the Court, in a suit under section 77, has no power to enquire into the propriety of his findings and direction. In *Tullockchand's* case the document was presented for registration on the expiration of four months from the date of its execution. Section 24, therefore, applied. The Sub-Registrar, however, accepted the document for registration without enquiring whether the non-presentation of it within the four months was owing to urgent necessity or unavoidable accident, as required by section 24. Subsequently, registration was refused by him on other grounds. Farran, C. J., in delivering judgment, said:—"We agree, however, with the ruling in *Durga Singh v. Mathura Das*⁽²⁾, that when a Registrar has made a direction under section 24 that a document shall be accepted for registration, the Court cannot inquire, under sections 77 and 74, into the propriety of that direction. If it finds that a direction has been given by the Registrar, it will assume that the Registrar gave the direction on grounds which seemed to him to be sufficient."⁽³⁾ This was said of section 24. In the present case we are concerned with section 25, which also deals with "acceptance for registration" and occurs in the same Part. The same reasoning ought to apply. However, I will assume that the Court's jurisdiction to pass a decree directing registration depends upon the question whether the plaintiff has done all that the Act says he should do as preliminary conditions to registration; that he ought to satisfy the Court by means of evidence led before it

(1) (1897) 21 Bom. 724.

(2) (1884) 6 All. 460.

(3) (1897) 21 Bom. 724 at p. 729.

that he has complied with those conditions; and that if the Registrar has refused registration on one ground, the fact that he has, on other grounds, found in favour of the party seeking registration becomes immaterial. When that party comes into Court the whole case is re-opened and he must prove it. So treating the case, what is the effect of the evidence recorded before me?

[His Lordship here dealt with the recorded evidence at great length, and proceeded :—]

Upon the whole, the plaintiffs have proved to my satisfaction that the document, Ex. C, arrived in British India for the first time in December 1904 and that it was presented for registration within four months of such arrival. I find, therefore, the second and the third issue in the affirmative.

Having disposed of the important question of fact in the case, I turn now to the questions of law discussed at the Bar.

The first of those questions is whether there was "acceptance for registration" within the meaning of the Act, and whether after such acceptance it was open either to the Sub-Registrar or the Registrar to refuse registration on the ground mentioned in section 21 of the Indian Registration Act, *viz.*, that the document did not contain a description of the immoveable property to which it related "sufficient to identify the same."

What happened before the Sub-Registrar is this. The document was presented to him for registration; the registration fee was received from the first plaintiff and payment thereof was endorsed on the document. The Sub-Registrar then issued a commission for the examination of Fatmaboo as to execution. She, however, failed to appear before the Commissioner, and the commission returned unexecuted. The Sub-Registrar thereupon treated her non-appearance as denial of execution, and both on that ground and on the ground that the document did not contain a sufficient description of the immoveable property to which it related, he "refused" registration under sections 35 and 21. Then there was an appeal to the Registrar. The Registrar issued a commission to Cambay for the examination of witnesses as to the execution of the document. That commission having returned executed, the Registrar held upon the

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evidence that the execution of the document by Fatmaboo was proved, but he too refused registration on the ground that the provisions of section 21 had not been complied with. Under these circumstances Mr. Raikes, for the plaintiffs, contends that it was not open either to the Sub-Registrar or the Registrar to refuse registration on the ground of section 21. His argument is that when a document has been presented and the Sub-Registrar has received the fee for registration, there is "an acceptance for registration" by which the registering authority is bound; that it is before such acceptance that the registering officer has to satisfy himself whether the conditions for acceptance, prescribed in the Act, have been complied with; and that after such acceptance he cannot go back upon it, but he can refuse to register only under the circumstances mentioned in section 35. And Mr. Raikes relies, in support of this contention, on the decision of this Court in *Gangava v. Sayava*⁽¹⁾, where, in interpreting certain provisions of the Registration Act, Jardine and Ranade, JJ., held that "the Act . . . means different things by the two phrases, *refuse to register* found in sections 19 and 35, and *refuse to accept for registration* found in sections 20 and 21". It was said there:—"The first thing to be done by the registering officer is to decide whether to accept or not accept. It is only after the acceptance for registration that he can consider the wider question which arises on admissions and denials and evidence, whether he should refuse to register." In the present case, it is clear upon the evidence of the Sub-Registrar's clerk and of the proceedings before the Sub-Registrar and the Registrar that they dealt with the question of *acceptance for registration* and of *refusal to register* together. According to Mr. Raikes' argument, after the registration fee had been paid to, and the document had been received by, the Sub-Registrar, and after he had issued a commission for the examination of the executant, the Sub-Registrar's act was tantamount to *acceptance for registration*. The decision of this Court just mentioned supports that contention. In the present case we are concerned with section 21 only. The provisions of the Act which deal with "acceptance for registration" invest the registering officer with a discretion,

(1) (1896) 21 Bom. 699.

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with the exercise of which a Civil Court has no power to interfere. So it was held by Farran, C. J., and Strachey, J., in *Tullockchand v. Gokulbhoy*⁽¹⁾, with reference to the provisions of section 24 of the Act, which, like section 21, concern "acceptance for registration". Applying that decision to the present case, I must hold that it was the duty of the Sub-Registrar to decide the question whether he should *accept* or not the document for registration before embarking on the enquiry as to execution. When he received the document and the registration fee and endorsed the payment on the document and issued a commission, he must be regarded as having exercised his discretion under section 21 and accepted the document for registration. But supposing that there was at first no acceptance under that section, and that being a matter of the Sub-Registrar's and the Registrar's discretion, the Court cannot, in a suit under section 77, question the subsequent exercise of such discretion by either of them, the Court has still power to decide whether there was any call in this particular case for the exercise of the discretion under section 21, having regard to the contents of the document (Exhibit C) presented for registration. The discretion under section 21 arises only where a non-testamentary document "relates to immoveable property." Where it does not so relate, the section cannot apply and the discretion cannot arise. That into this question it is open for a Civil Court to enquire in a suit under section 77 is clear from the decision of Farran, C. J., and Strachey, J., already referred to. (*Tullockchand v. Gokulbhoy*⁽¹⁾.) There the facts were, on the question of registration, similar to those here. In that case a document called B was presented and *accepted* for registration; the Sub-Registrar *refused* registration on the ground that the executant had declined to admit execution. There was an appeal to the Registrar. Before him the executant appeared and admitted execution, but raised objections to its registration. The Registrar refused to register the document on the ground that the conditions of section 21 had not been complied with. A suit was brought in this Court under section 77 to compel registration. Fulton, J., decreed registration.

(1) (1897) 21 Bom. 724.

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(See *Gokulbhoy v. Tullockchand*⁽¹⁾). In appeal, Farran, C. J., and Strachey, J., went into the question whether the document "related to immoveable property" within the meaning of section 21, and, holding that it did not, confirmed the decree passed by Fulton, J.

That is also the question here. Does Exhibit C relate to any immoveable property? And if it does, is it within the meaning of clause (b), section 17 of the Act, a non-testamentary instrument which purports or operates "to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property?"

The document was executed by Fatmaboo in favour of her father. After reciting that as to *any property there may be on his death* she has "a right of inheritance according to Mahomedan Law" and that her mother had directed him to give ornaments to her, she relinquishes all her rights and claims in consideration of her receiving the sum of Rs. 9,000.

The first point to notice here is that the document relates to any property there may be on the death of the executant's father. It is not said in the document that such property is or shall be immoveable. It may be that or moveable on the father's death. And how are you to describe property which does not exist at the date of the document but which may possibly exist on the father's death? To expect the parties to such a document to describe such property in the same way as property known to exist is to expect them to do the impossible, and the Legislature never requires parties to do that. In the first place the document cannot be treated as relating to property because it relates to mere heirship; much less can it relate to immoveable property, capable of being described and identified: see *In re Ellenborough. Towry Law v. Burne*⁽²⁾, where Buckley, J., held that an assignment of a mere expectancy is not an assignment of property. Section 21, therefore, cannot apply to it. But supposing it does apply because, taking the words of the section in their widest sense, the document relates to immoveable property, being a document by which Fatmaboo gives up her right

(1) (1896) 21 Bom. 69.

(2) [1908] 1 Ch. 697 at p. 701.

of inheritance to such of her father's immoveable property as he may leave on his death, then we have not only a sufficient, but the only, description that can be given of it. It can only be described as property that he may leave on his death. No other description was possible until the father died. The conditions of section 21 are therefore satisfied.

Then the next question is—Is it a document falling within clause (b) of section 17 of the Registration Act or any other clause of the same section, or within section 18? What is released by Fatmaboo is her right of inheritance to her father's property—*i.e.*, such property, whether moveable or immoveable, as he may leave on his death. One essential condition, however, of clause (b), section 17 of the Registration Act, is that the right, title or interest created, declared, assigned, limited, or extinguished, must be, “present or in future,” “vested or contingent.” It can hardly be said that Fatmaboo had any “present” right, title or interest to or in her father's immoveable or moveable property at the moment of the execution of the document. In terms the right, title or interest which she purports to relinquish was one which was to come into existence *on her father's death*. Can it be then a right, title or interest “in future”? But, as was held by Westropp, C. J., and Melvill, J., in *Nana bin Lakshman v. Anant Babaji*⁽¹⁾, on the interpretation of the similar sections of the previous Registration Acts, the words “in future” have reference “to estates in remainder or in reversion in immoveable property, or to estates otherwise deferred in enjoyment.” The right of a son or daughter or other heir of a person to inherit his property is not one of such estates. It is neither a vested nor a contingent right. It does not come within the definitions of “a vested interest” in section 19 of the Transfer of Property Act and of “a contingent interest” in section 21 of that Act and section 107 of the Indian Succession Act. So far from being a vested or a contingent right, or a right in present or in future, it is, in the language of clause (a) of section 6 of the Transfer of Property Act, “the chance of an heir-apparent succeeding to an estate,” or “a mere possibility” of succession which cannot be transferred. As has been held by the Calcutta

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(1) (1877) 2 Bom. 353.

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High Court, "the provisions of section 6" of the Transfer of Property Act "are only intended to apply to cases of a mere hope or chance of succession which may be defeated by the act of some person having the present disposal of the property": *Brahmadeo Narayan v. Harjan Singh*⁽¹⁾. And this was exactly Fatmaboo's position when she executed Exhibit C. By that document she merely gives up that "hope" or "chance." Such "hope" or "chance" is a mere possibility—it is not property, much less is it immoveable property. If it were property, how is it to be valued? As has been rightly observed in the Calcutta decision referred to above, "mere possibilities of succession are wholly incapable of valuation."

The decided cases both of the English Courts and our Indian Courts support that view. In *In re Parsons. Stockley v. Parsons*⁽²⁾, Mr. Justice Kay said:—"It is indisputable law that no one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir at law or next of kin of such living person. During the life of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to his property." Further on he adds, "a *spes successionis* is not a title to property by English law," that the word "title" is equivalent to "interest," that "one who has no interest whatever in property can hardly be said to have a title," and "that no one can have any 'interest' as heir or next of kin in the ancestor's lifetime". Again:—"Can a possible next of kin of a person who is to be supposed to die at a future time be said to have a 'contingent title', or is not the proper view that he has no title at all, nothing but an expectation or hope which is not recognised in law as any title? While the *propositus* is living every relative he has in the world is a possible next of kin. Can each one say that he has a contingent title? He may have sons, brothers and nephews. Can the nephew, leaving the sons and brothers, say 'I have a title'? If he cannot, then the brother cannot, nor the son. A *spes successionis* is not a title to property by English Law."

As to Indian decisions, in *Hasan Ali v. Naro*⁽³⁾, Mr. Justice Straight, Brodhurst, J., concurring, observed:—"If I under-

(1) (1898) 25 Cal. 778 at p. 780. (2) (1890) 45 Ch. D. 51 at pp. 55, 56, 63.

(3) (1889) 11 All. 456 at p. 458.

stand the Mahomedan Law aright, it does not recognise any reversionary inheritance or contingent interest expectant on the death of another, and till that death occurs which by force of that law gives birth to the right as heir in the person entitled to it according to the rule of succession, he possesses no right at all." In *Abdul Wakid Khan v. Mussumat Nuran Bibi*⁽¹⁾ the Judicial Committee of the Privy Council held that the Mahomedan Law does not recognise an estate of the kind called vested remainder. In that case Mr. Justice Mahmood (then District Judge) had held that "under the Mahomedan law a mere possibility, such as the expectant right of an heir-apparent, is not regarded as a present or vested interest and cannot pass by succession, bequest, or transfer, so long as the right has not actually come into existence by the death of the present owner. This principle of Mahomedan Law is uniform in its application to matters of succession, whether in virtue of bequest, inheritance, or otherwise." It is true that the Judicial Committee merely quote this passage without expressing either approval or disapproval. But if, as their Lordships held, the Mahomedan Law does not recognise such an interest in an estate as a vested remainder, it ought to follow that a more precarious thing than that, such as a mere *spes successionis*, is unknown to, and not recognised by, that law. And that was the decision of the Allahabad High Court in *Hasan Ali v. Nazo*⁽²⁾, where Mr. Justice Straight refers with approval to the view expressed by Mr. Justice Mahmood in the passage which I have quoted. It follows from this that the Mahomedan Law is in this respect the same as that laid down by the Legislature in section 6, clause (b), of the Transfer of Property Act. In Mr. Dinshaw F. Mulla's useful edition of "The Principles of Mahomedan Law," that law has been summed up tersely in these words:—"The right of an heir-apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor."⁽³⁾

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(1) (1885) 12 I. A. 91.

(2) (1899) 11 All. 456.

(3) p. 36.

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What, then, is the real nature of the transaction evidenced by Ex. C. It has been spoken of at the Bar in loose but not in legal parlance as a release. Where a person enters into an agreement to release property which may descend to him as an heir, it is a contract to release the right of heirship when it comes into existence. Such a contract, being an agreement to release the right of heirship hereafter, gives only a right to the person in whose favour it is, to demand a release when the right comes into existence. It is merely evidence of a contract to be performed *in futuro* upon the happening of a contingency of which the parties can claim specific performance if, when the right as heir comes into existence, they show that they have done all they were bound to do. Whether such a contract is valid or not is a question which does not arise in the present suit and I refrain from expressing any opinion upon it. But it is sufficient for the present purpose to hold that Ex. C does not fall within the category of any of the documents mentioned in section 17 of the Registration Act, but that it falls within clause (d) and clause (f) of section 18. It falls within clause (d) of section 18 because there is a release by Fatmaboo of her right to certain ornaments to which she had a present right. It falls within clause (f) because it is a document by which Fatmaboo agrees to release her right as heir to her father and that belongs to a class of documents not mentioned in section 17 and not falling within the preceding clauses of section 18.

It follows from this conclusion that it was not necessary to describe any immoveable property in Ex. C. That description was not material, and its addition after the execution of the document and behind the back of the executant, Fatmaboo, did not and could not materially alter the document. The alteration to be material must affect the legal effect of the contract so as to make it cease to be the same instrument (see per Brett L. J. and Cotton L. J. in *Suffell v. Bank of England*⁽¹⁾). Here the addition of a description of the immoveable property could not affect the instrument because that property was not within its scope. The document affected such property as might be in existence on the death of Fatmaboo's father, and Fatmaboo had

(1) (1882) 9 Q. B. D. 555 at pp. 59, 572.

no interest, present or future, vested or contingent, in the immoveable property which he owned at the date of the document.

I allow the claim as prayed for in the plaint. Defendants to pay the plaintiffs' costs.

Suit decreed.

Attorneys for the plaintiffs: *Messrs. Payne & Co.*

Attorneys for the defendants: *Messrs. Bhaishankar, Kanga and Girdharlal.*

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ORIGINAL CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batty.*

FRAMJI SHAPURJI PATUCK AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS, v. FRAMJI EDULJI DAVAR (ORIGINAL DEFENDANT),
RESPONDENT.*

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12.

Indian Easements Act (V of 1882), section 28, clause (c)—Disturbance of Easements—Meaning of Disturbance—Injunction to prevent disturbance—Light and Air—Physical comfort—Substantial Damage.

The Indian Easements Act is not merely prescriptive; it defines the law relating to easements and thus differs from the English Act in its ambit.

Section 28, clause (c) of the Act provides that the extent of a prescriptive right to the passage of light and air to a certain window, door, or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purpose for which it has been used.

PER CURIAM:—"In any case I see no reason for withholding from disturbance its legal sense of an illegal obstruction, and, for the purpose of chapter IV, that only can (in my opinion) be an illegal obstruction, for which, if done, a suit would lie. Therefore I hold that for an injunction there must be a threat of something more than mere obstruction and so the plaintiffs' first contention fails."

To establish that the plaintiffs have suffered substantial damage to their rights to light and air they must show material diminution in the value of their heritage or material interference with their physical comfort.

* Appeal No. 1400, suit No. 791 of 1904.

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The expression "physical comfort" does not admit of precise definition, but it is sufficiently exact when applied as a test to a given state of things to allow the ordinary reasonable man to arrive at a practical determination. A man's physical comfort in relation to the access of light and air to his house at any particular time depends upon the conditions then actually obtaining, regardless of how these conditions came into being or when they may cease: it is a present fact uninfluenced by past history or future fate.

Therefore for the purpose of applying the test of the plaintiffs' physical comfort we must look at the state of their property as it is, not as it was, or as it may be.

APPEAL from the judgment of Chandavarkar, J.

The parties to this suit owned contiguous properties in Bombay. The plaintiffs' property prior to 1902 consisted of a large two-storied bungalow with out-houses on the east and west side thereof. On 12th January 1898 the said west out-house was partially destroyed by fire. In the southern wall of the said out-house there were until December 1902 eight honeycombed openings containing triangular apertures. In December 1902 the plaintiffs demolished the said west out-house and erected on the site thereof subject to a set-back required by the Municipality a new building consisting of a ground floor and two upper floors and in the southern wall of the said new building, and on the ground floor storey thereof the plaintiffs opened certain windows. The defendant erected a building on vacant ground immediately to the south of the plaintiffs' said new building which, the plaintiffs alleged, materially interfered with the access of light and air to the plaintiffs' said windows. The plaintiffs claimed an injunction or in the alternative damages against the defendant. The defendant by his written statement denied the existence of the plaintiffs' easement at any time, and in the alternative claimed that if any easement ever had existed the same had been destroyed when the plaintiffs demolished their said south wall. The plaintiffs' building was not a rebuilding but a new building imposing a greater burden on the servient heritage. He denied that the plaintiffs had suffered any physical discomfort or substantial damage.

Chandavarkar, J., found for the defendant and dismissed the plaintiffs' suit. The plaintiffs appealed.

Baptista (*Jardine* with him) for the appellants.

Our new south wall is in the same position as our old one except in so far as the set-back required by the Municipality is allowed for. We are using through our new windows the same light which passed through the old apertures into the old building: *Scott v. Pape*.⁽¹⁾ It is not necessary to show to an inch or two the position of the former apertures.

Our easement is not destroyed under section 45 by our out-house being partially burnt: *Ecclesiastical Commissioners for England v. Kino*.⁽²⁾

There has been a substantial deprivation of light: *Colls v. Home and Colonial Stores, Limited*,⁽³⁾ but in this country you want a greater angle of light, so English cases are not of much assistance. We are bound by the Easements Act.

Counsel also quoted *Hackett v. Baiss*,⁽⁴⁾ *Modhoosoodun Dey v. Bissonauth Dey*,⁽⁵⁾ *Kine v. Jolly*,⁽⁶⁾ *Higgins v. Betts*.⁽⁷⁾

Scott, Advocate-General (*Raikes* with him) for respondent.

The question is whether we are reducing the price of the plaintiffs' property.

Both the dominant and servient tenements are to be considered according to *Colls' case*.⁽³⁾ We have left him more than we were bound to leave. We have committed no legal wrong. Our strict legal rights as regards plaintiffs' new bungalow are that the plaintiffs have no easement. They cannot define or show on their windows the corresponding portions on their old apertures: *Pendarves v. Monro*.⁽⁸⁾ They must show that the house is made substantially less fit for occupation: *Gaunt v. Fynney*,⁽⁹⁾ *Theed v. Debenham*,⁽¹⁰⁾ *City of London Brewery Company v. Tennant*.⁽¹¹⁾

Baptista in reply.

JENKINS, C. J.—The parties to this suit are the owners of contiguous properties in Bombay. The complaint at the insti-

(1) (1886) 31 Ch. D. 554.

(2) (1880) 14 Ch. D. 213.

(3) [1904] A. C. 179.

(4) (1875) L. R. 20 Eq. 491.

(5) (1875) 15 B. L. R. 361.

(6) [1905] 1 Ch. 480.

(7) [1905] 2 Ch. 210.

(8) [1892] 1 Ch. 611.

(9) (1872) L. R. 8 Ch. 8.

(10) (1876) 2 Ch. D. 165.

(11) (1873) L. R. 9 Ch. 212.

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tution of the suit was the disturbance or threatened disturbance by the defendant of a prescriptive right to the access and use of light and air to and for a building on their property, claimed by the plaintiffs. The defendant's threatened acts have now been performed, and the worst is known.

By the prayer in this plaint the plaintiffs sought an injunction and compensation. The injunction was refused, and the only compensation awarded was Rs. 100 in respect of one of the several disturbances alleged. From this decree the plaintiffs have preferred this appeal.

Before the first Court the plaintiffs complained of disturbance to their prescriptive rights in respect of three buildings, distinguished as the Old Buildings, the New Buildings, and the Privies.

Before us the contest has been limited to the first and last of these: nothing has been said as to the New Buildings.

With respect to the prescriptive right claimed for the old buildings three points only have been urged, (a) that even if substantial damage was not proved, an injunction should have been granted, (b) that in estimating the extent of the disturbance, it was wrong to have regard to other sources of light, and (c) that the effect of the smoke from the defendant's cookroom was not taken into consideration.

As to the privies it is urged the defendant's completed work shows that the award of Rs. 100 as damages was an inadequate relief.

The contention that an injunction should have been granted, though substantial damage in the opinion of the learned Judge was not proved, rests on the words of section 35 of the Indian Easements Act, 1882. To understand and deal with the argument, however, it is necessary to examine its other sections. The Act is not merely prescriptive: it defines the law relating to Easements and thus differs from the English Act in its ambit. In the first section it is declared that an easement is a right, which the owner or occupier of certain land—an expression which includes things permanently attached to the earth—possesses as such for the beneficial enjoyment of that land to do and continue to do something, or to prevent and continue to

prevent something being done in or upon or in respect of certain land not his own. Easements are restrictions, on the rights of others (section 7), and where, as here, a prescriptive right of light or air is the easement, it is a restriction on the exclusive right of an owner of land in a town to build on such land: it includes the right to prevent the owner from building on his land that which will disturb the prescriptive right, contrary to the terms of the Act.

The 15th section describes the conditions requisite to the acquisition of an easement of light or air by prescription, and on the happening of those conditions the right to access and use of the light or air shall be absolute.

The extent of this prescriptive right is defined in section 28, which in clause (c) provides that the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purpose for which it has been used.

Provision is made against the infringement of these rights in Chapter IV of the Act. The owner or occupier of the dominant heritage is entitled to enjoy the easement without *disturbance* by any other person.

The remedies for disturbance are prescribed by sections 33 and 35. Thereby the owner of any interest in the dominant heritage or the occupier of such heritage may institute a suit for compensation for the disturbance of the easement provided that the disturbance has actually caused substantial damage to the plaintiff (section 33).

And subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement—

(a) if the easement is actually disturbed—when compensation for such disturbance might be recovered under Chapter IV of the Act:

(b) if the disturbance is only threatened or intended—when the act threatened or intended must necessarily, if performed, disturb the easement.

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The argument of the appellant put briefly is this : when the case was in the lower Court the disturbance was only threatened or intended : an injunction can in such case be granted under section 35, when the act must necessarily, if performed, disturb the easement : the condition that the disturbance should cause substantial damage is not imported.

It comes to this that there is a cause of action for an act apprehended, even where there is no cause of action for the same act done.

This is opposed to the principle on which *quia timet* remedies rest, and the unreasonableness of the conclusion suggests a further examination of the premises.

The Act is obviously the work of English lawyers, and regard must be had to the sense in English law of the expressions used.

The 4th Chapter is headed "The Disturbance of Easements," and that which gives rise to a suit is described as a disturbance.

Disturbance is a word possessing a special legal significance in English Law. In Blackstone's Commentaries it is stated, "The last species of injuries to real property—which, in some instances, amounts also to the injury of nuisance of which we have already treated—is that of *disturbance*: which is the wrongful obstruction of the owner of an incorporeal hereditament in its exercise or enjoyment." And in Gale on Easements⁽¹⁾, 6th Edition, page 552, it is said, "It is not every interference with the full enjoyment of an easement that amounts in law to a disturbance; there must be some sensible abridgment of the enjoyment of the tenement to which it is attached, although it is not necessary that there should be a total obstruction of the easement. The injury complained of must be of a substantial nature, in the ordinary apprehension of mankind, and not arising from the caprice or peculiar physical constitution of the party aggrieved."

The language of the Act too points to the use of the expressions *disturb* and *disturbance* in their specialized legal sense, for it is difficult to suppose that the right given in express words

(1) pp. 535, 536 (7th Edn.).

by section 32 was not intended to be protected in its entirety by the remedies prescribed in the succeeding sections.

It would almost seem that what is stated in section 32 as a proviso, is in fact the inherent meaning of the expression throughout the chapter.

In any case I see no reason for withholding from disturbance its legal sense of an illegal obstruction, and, for the purpose of Chapter IV, that only can (in my opinion) be an illegal obstruction, for which, if done, a suit would lie. Therefore I hold that for an injunction there must be a threat of something more than mere obstruction and so the plaintiffs' first contention fails.

For another reason too it cannot be sustained. The granting of an injunction is at most discretionary: if a suit to prevent the disturbance of an easement of light or air be grounded on nuisance then section 56 (g) of the Specific Relief Act affords a complete answer to the plaintiffs' contention: if it be grounded on the Easement Act, then the analogy of section 56 (g) affords a reason for the Court's refusing the injunction in the exercise of its discretion.

I now come to the objection that substantial damage has been caused.

To establish this the plaintiffs must in the circumstances of this case show material diminution in the value of their heritage; or material interference with their physical comfort (see explanations to s. 33).

The argument before us has been limited to the second of these points.

The defendant's building is completed and as Mr. Justice Batty and I have viewed the premises, it will be convenient to speak of things as they are, and to discuss the whole question from that standpoint, and to express my conclusions in the concrete.

The expression *physical comfort* does not admit of precise definition, but it is sufficiently exact when applied as a test to a given state of things to allow the ordinary reasonable man to arrive at a practical determination. A man's physical comfort in relation to the access of light and air to his house at any particular time depends upon the conditions then actually obtaining, regardless of how those conditions came into being or

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when they may cease : it is a present fact uninfluenced by past history or future fate. If an obstruction to the access of light darkens my room, that darkness is not diminished because the obstruction is of my own creating in the past : the darkness is still there however or by whomsoever created. Nor is my room dark to-day, merely because it may be darkened by an obstruction another may create to-morrow, and of physical comfort as dependant on light and air the same is true.

Therefore for the purpose of applying the test of the plaintiffs' physical comfort we must look to the state of their property as it is, not as it was, or as it may be. In estimating therefore the plaintiffs' present physical comfort I think it is erroneous to take into account lights previously obstructed, though by the plaintiffs ; and (in my opinion) the plaintiffs cannot claim that we should exclude from consideration sources of light alleged to be liable to obstruction hereafter.

How far these matters may affect the remedy to be granted I do not now discuss. But the precariousness of any source of light or air may be relevant to the question whether substantial damage has been caused by diminution in the value of the premises ; and though this point was not argued before us in this shape, it may legitimately be considered, as the distinction I have drawn does not exclude the applicability of much that has been urged before us : it merely gives it a different direction.

But even so I think in the circumstances of this case the existing sources of light and air were rightly taken into consideration, though in respect of some of the windows concerned no prescriptive right of light and air exists. I doubt whether it would be possible to obstruct those windows without disturbing prescriptive rights established in respect of windows in their immediate neighbourhood.

But apart from this, the defendant's contention that these sources of light and air must be taken into consideration would (in my opinion) preclude him from hereafter obstructing them : that would be to approbate and reprobate. And more than that, he has offered an undertaking which will completely preserve them to the plaintiffs. This undertaking will be embodied in the Court's decree.

The defendant's undertaking too as to the smoke from the cookroom in his premises renders it unnecessary to consider the plaintiffs' objection on this score.

This then brings me to the question of fact whether substantial damage has been caused by the obstruction of the free passage of light and air to the plaintiffs' premises.

The evidence adduced before Chandavarkar, J., had to be, and was largely speculative, and for that reason no doubt has not been discussed before us by the appellants, it being the wish of the parties that our inspection should take its place. Of all the witnesses called the learned Judge, who has bestowed on this case the greatest care, has placed most reliance on Mr. Chambers; he describes him as an architect of great experience, who gave his evidence with extreme candour: and again he says "Mr. Chambers gave his evidence very clearly and appeared to me to have made his observations as to the premises in dispute with considerable care. Upon the whole I regard him as the most satisfactory of the witnesses examined in the case. And the effect of his evidence is decidedly in favour of the defendant."

This appreciation has not been impugned, and ocular observation has convinced my learned colleague and myself that Mr. Chambers' anticipations were well founded.

The defendant's new building has no doubt deprived the plaintiffs of their pleasant prospect over their neighbour's compound, but of that they cannot successfully complain. We are only concerned with such substantial damage as can be ascribed to the interruption of the free passage of the light and air. The only room in the old buildings affected is the big south room, and I can only say that so far as light and air goes it is, notwithstanding the defendant's building, a decidedly comfortable room and my visit to it completely dispelled the sombre hues of the gloomy picture painted before us with so much skill and pathos by the learned counsel for the appellant.

Though I did not see the premises before the erection of the plaintiffs' building, the evidence furnishes materials for estimating the light and air to which the plaintiffs had a prescriptive right, and no material diminution is proved, and when I have regard to the present condition of the southern room I have no doubt

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that the plaintiffs have completely failed to prove such substantial damage to the old buildings as the Act requires.

Then there are the privies, which the learned Judge considered damaged to the extent of Rs. 100.

How the plaintiffs succeeded in obtaining any damages is not clear; for I am told that the disturbance was at the date of the decree only apprehended, while compensation under s. 33 can only be awarded where the disturbance has *actually caused substantial damage*. Obviously then it cannot be said the Judge should have awarded more compensation, where there was no power to award any.

It has occurred to me whether it would be legitimate for us now to estimate the damages by reference to conditions which have come into existence since the decree of the first Court was passed (*Rustomji v. Sheth Purshotamdas*⁽¹⁾). But I am met by the difficulty that we have no materials on which to base our estimate, and I cannot on mere speculation say that Rs. 100 is not an adequate compensation.

But it is said an injunction should have been granted. The Judge obviously was of opinion that though there might be substantial damage, the case was not one where in his discretion he ought to grant an injunction.

Can we say he exercised his discretion wrongly? Clearly not. When regard is had to the nature of the openings and their position, and to the purpose they are intended to serve, it is in my opinion impossible to contend that the learned Judge was not well within the limits of his powers when in the exercise of his discretion he determined not to grant an injunction.

The only other objection urged is that the learned Judge should not have awarded Rs. 1,000 in respect of the undertaking as to damages given on the interim injunction granted against the defendant.

But this point was not pursued when counsel's note was read as to the circumstances under which this sum was fixed.

Apart therefore from the question of costs in the lower Court—as to which we are to hear further argument—I hold that the decree should be confirmed with costs, subject to the

(1) (1901) 25 B.m. 66.

variation necessitated by the introduction of the undertakings I have mentioned.

I would add one word of explanation: though many English authorities were cited to us, I have mentioned none. It is not that I have omitted to consider them, but in this Presidency the Law of Easements is defined by the Indian Easement Act, 1882, and it therefore seemed to me, in the language of Bowen L. J., a wiser policy to go back in a humble spirit to the words of the Act by which our decision must be governed.

Decree confirmed.

Attorneys for appellants: *Messrs. Bicknell, Merwanji and Romer.*

Attorneys for the respondent: *Messrs. Payne & Co.*

B. N. L.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

KARSONDAS DHARAMSEY (ORIGINAL DEFENDANT No. 8), APPELLANT,
v. BAI GUNGABAI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS),
RESPONDENTS.*

1905.

November 6.

Limitation Act (XV of 1877), section 5—Admission of appeal after prescribed time—Application for excuse of delay—Practice.

To entitle a person to succeed on an application to excuse delay in presenting an appeal, he must satisfy the Court that he had sufficient cause for not presenting an appeal within the prescribed period. When the time for appealing is once passed a very valuable right is secured to the successful litigant; and the Court must therefore be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages which he has obtained.

THIS was a motion on behalf of Karsondas Dharamsey (original defendant No. 8) for leave to file an appeal against a decree passed on the 10th April 1901 by Russell, J., in O. C. J. suit No. 573 of 1899.

* Motion to appeal from the decision of Russell, J., in O. C. J. suit No. 573 of 1899.

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To that suit Karsondas was a party as the 8th defendant. At the date of the institution of the suit (August 1899) as well as the date of the decree, he was a minor and was represented in the suit by guardians *ad litem* properly appointed. He attained majority on the 21st July 1905.

Setalvad, for the applicant.

Scott (Advocate-General) and *Raikes*, for respondents 1—4.

Strangman, for respondents 5—7.

JENKINS, C. J.—This is an application for the admission of an appeal after the prescribed period of limitation.

The decree was passed as far back as April 1901 in a suit brought by one Gordhandas, who is now dead, for a declaration that a trust-deed executed by his father Sunderdas and his grandfather Mulji Jetha was inoperative, and that the property remained in the settlers notwithstanding the execution of the deed of settlement.

The case was heard by Mr. Justice Russell and he passed a decree in favour of the plaintiff holding that the trust-deed was inoperative and that the property passed under the will of Mulji Jetha.

The party who now desires to appeal is Karsondas, the nephew of Gordhandas and the son of Dharamsey, who was Gordhandas' brother. He was, at the commencement of the suit and during the whole of its pendency, a minor and was represented by guardians. His complaint is that though the Judge did not, as he should have, decide in his favour, no appeal was presented.

To entitle him to succeed on this application he must satisfy the Court that he had sufficient cause for not presenting an appeal within the prescribed period. For a decree is as binding on infant party as on adult.

When the time for appealing is once passed a very valuable right is secured to the successful litigant: and the Court must therefore be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages which he has obtained.

Now in this case it is true that it was an infant against whom the decree was passed, but, as I have said, that infant was

represented as the law requires by duly appointed guardians, and there is no fraud on the part of those guardians suggested, no reckless abandonment of the interests of the infant, nor can it be said with any fairness that there was neglect on their part. The guardians had for the purposes of the trial secured the assistance of eminent Counsel going indeed to the length of briefing for the purpose of the hearing Counsel from Calcutta, and I find it difficult to suppose that the Counsel employed and the solicitors engaged on the part of those guardians did not put forward and press every point that could be advantageously made on behalf of the infant.

Then the guardians considered whether or not an appeal should be presented. They sought the advice of two Counsel on the point.

To one Counsel they addressed the question which appears to me to have been a most proper question for them to address, "whether in Counsel's opinion if an appeal is filed in this case it will be successful?"

What is the answer? "The case is fraught with so many difficulties and intricate questions of law that it is impossible to say with any certainty that the appeal will be successful."

Then the learned Counsel goes on to say "In my opinion this is a case in which there should be an appeal. There are many points in the case in which, in my opinion, the learned Judge has been in error deciding in the way he has done."

Another learned Counsel was consulted and he was of opinion that there should be no appeal and he went on to point out, as the Judge himself had remarked, that an appeal by the guardians if unsuccessful would probably result in an adverse order as to costs.

Under the circumstances it appears to me that the guardians acted with every propriety, and I fail to see how it can be in any way suggested that there was in their conduct anything that would render the decree open to attack.

But then it has been urged before us that there was a point which was not made out, but should have been made on behalf of the minor: and that point is, that it should have been pressed upon the Judge that though the deed of settlement was inopera-

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tive, still it could not in the circumstances legitimately be held that the property passed under the will of Mulji Jetha, for it was obvious that the property was joint.

But the minor or those acting on behalf of the minor claimed the entirety of the property, and this was inconsistent with the suggestion that is now made of its being joint. While on the other hand so far as it concerns the property in suit it would have been as advantageous to Karsondas to contend that it was joint as that it passed under the will of Mulji Jetha, and, if the point was not advanced, as to which I do not feel in a position to express any definite opinion on the materials before us, I am clear that under these circumstances there would not be sufficient to justify us in conceding to the applicant the right of appeal beyond the prescribed period. In this connection it is impossible to overlook the grave hardship that it would be on Gordhandas' representatives, if we were to allow this extended right of appeal.

Had the decision of Mr. Justice Russell been that the property was joint, then Gordhandas, had he so wished, could at once have made such disposition as would have secured to him by partition a separate interest. Now that is impossible, for he is dead. If it now were held that the property was joint then those who claim under Gordhandas would be deprived of what has devolved on them, because the operation of the doctrine of survivorship would carry the whole of the property to the young man Karsondas. Would it be just to make any concession in the circumstances of this case which would lead to such a result? Clearly not.

But there are other matters referred to in the very full and careful affidavit of Mr. Jamsetji which tends in the same direction.

Thus it may very well be questioned whether having regard to the agreement that was sanctioned by the Court it could with any fairness now be permitted to the applicant to have the right of extended appeal which he seeks.

I notice too that Mr. Justice Russell in dealing with the application made an order as to costs more favourable to Karsondas than would otherwise have been the case in the hopes that thereby the litigation would cease.

I do not place much stress upon that circumstance, but I find that in the case of *Monypenny v. Dering* ⁽¹⁾ an order as to costs, on the understanding that it was made for the purpose of preventing further litigation, was regarded as a circumstance to be taken into consideration in determining whether or not a decree adverse to an infant should be attacked subsequently.

The conclusion, therefore, to which I come is that in the exercise of our discretion under section 5 of the Limitation Act, we ought not to permit this appeal after the prescribed period, and we accordingly dismiss this application with costs.

Costs of both the respondents must be paid by the applicant.

Application dismissed.

R. R.

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APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Russell.*

KRISHNAI KOM MARTAND (ORIGINAL PLAINTIFF), APPELLANT, v. SHRI-PATI BIN PANDU AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1905
December 1.

Mitakshara—Co-widows—Deceased co-widow—Stridhan property of the deceased—Surviving co-widow entitled to succeed—Nearest surviving Sapinda of the husband.

According to the Mitakshara a surviving co-widow is entitled to succeed to the Stridhan property of her deceased co-widow as the nearest surviving Sapinda of the husband.

SECOND appeal from the decision of A. Lucas, District Judge of Sátara, reversing the decree of S. N. Sathaye, Joint Subordinate Judge of Karád.

One Mahadu had two sons, namely, Bhika and Kusha, who were divided in interest and in separate enjoyment of their properties. Bhika had a son Martand, who pre-deceased his father, leaving behind two widows, Kasai and Krishnai, the plaintiff. After Bhika's death, his widowed daughter-in-law

* Second Appeal No. 326 of 1905.

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Kasai continued in possession of his property for more than twenty years. Kusha had three sons, Pandu, Khandu and Maruti. Maruti left three sons, Ganu, Shripati and Malu, defendants 1—3. Khandu left a son Balu, defendant 4, and Maruti left a son Krishna, defendant 5. After Kasai's death, which took place in or about the year 1900, her co-widow Krishnai brought the present suit in the year 1903 against the defendants to recover the property which was in Kasai's possession, alleging that the defendants forcibly dispossessed her in July 1902.

Defendants 1—4 did not contest the suit.

Defendant 5 answered, *inter alia*, that the plaintiff was not the owner of the property and she did not state how she was interested therein and that the defendant had inherited it and was its full owner.

The Subordinate Judge found that the plaintiff's ownership was proved and that the defendant dispossessed her while she was in possession of the property. He, therefore, decreed the claim.

On appeal by defendants 2, 4 and 5 the Judge reversed the decree and dismissed the suit on the ground that as Kasai was in exclusive possession of the property for more than twelve years, she had acquired a title by adverse possession; therefore, the property would, on her death, pass to her husband's heirs, the defendants, and not to the plaintiff who could not come in as Kasai's heir.

The plaintiff preferred a second appeal.

S. R. Bakhle for the appellant (plaintiff):—The Judge has found as a fact that Kasai acquired title to the lands in dispute by adverse possession. The lands, therefore, became her *Stridhan*. According to the special line of succession for *Stridhan* property, the plaintiff being a co-widow of Kasai, is entitled to succeed to her property in preference to the defendants who are the nephews of her husband. This is deducible from the Mitakshara which lays down that in the case of *Stridhan* the property goes, in the absence of descendants, to a woman's husband, and, in the absence of husband, "to his nearest *Sapindas*" (*tatpratyāsannāh sapindāh*), that is, the next-of-kin. The present case comes from the Sātara District where the Mitakshara is the governing authority. The

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next-of-kin after the husband is, obviously, his widow. The Mitakshara is, no doubt, silent as to the specified heirs after the husband, but according to the author's well-known rule of succession, it is clear that the co-widow is the preferential heir: see West and Bühler, 3rd edition, pp. 517, 518; Banerji on Hindu Stridhan, pp. 362-3; Gharpure's Hindu Law, p. 205.

B. N. Bhajekar for respondents (defendants):—It is admitted that the Mitakshara is silent on the point involved and that it does not specifically mention the heirs after the husband to a woman's *Stridhan*. The omission cannot be said to be unintentional because the rival widow is mentioned in other places. Further with reference to *Shulka Stridhan*, for which a pretty full list of heirs is given, the rival wife is again conspicuous by her absence, although her daughter finds a specific mention.

The principle of *Sapindaship* in the sense of capacity to offer *Pindas* to ancestors cannot apply to the Mitakshara school because the Mitakshara interprets *Sapindaship* as meaning propinquity. But if propinquity be held as the principle for determining succession to *Stridhan*, then the Mitakshara would not be consistent with itself because it provides a list of specified heirs to *Stridhan* and excludes the son in favour of the granddaughter. This anomaly should not be carried further and should not be imported in the unspecified heirs that may come to be included in the expression "his next-of-kin" (*tatpratyāsannāh sapindāh*).

JENKINS, C. J.:—This case comes from the Sātara District and it raises the question whether a lady is entitled to succeed as heir to her deceased co-widow.

The property became the *Stridhan* of the deceased co-widow by the operation of the law of limitation; and the rival claimants are the grand-children of the brother of the co-widow's father-in-law.

Now, for the decision of this case, we must look at the Mitakshara. On the death of a woman without issue, which is the position with which we have to deal, it is said in paragraph 11 of section 11 of Chapter II, that the property of such a lady, if married by any of the four modes of marriage denominated

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Brahma, Daiva, Arsha, Prajapatya—belongs, in the first place, to her husband.

The lady in this case was married in one of these four modes, and the husband is dead. For this contingency provision is made in the following sentence, which says that “on failure of him, it goes to his nearest *Sapindas*.”

Now, there can be no question that the plaintiff, as the widow of the deceased husband, is his *Sapinda*, and according to the order prescribed in the Mitakshara, she is his nearest surviving *Sapinda*.

Why, then, are we not to give effect to this apparently simple provision of the law? We can see no adequate reason.

This view is accepted by such eminent text-writers as West and Bühler, and Sir Gooroodass Banerjee (see the first named authors at pages 517 and 518 of their work on Hindu Law⁽¹⁾, and the last named at pages 362 and following of his book on Hindu Law of Marriage and Stridhan⁽²⁾). In West and Bühler it is stated, though no authority is cited for the proposition, that a course of succession entitling the co-widow to succeed is in accordance with the custom on this side of India.

We, therefore, are of opinion that the widow can claim at least to be as against the parties to this litigation “the nearest *Sapinda*”; whether she may possibly have any higher right we are not now concerned to decide.

The decree of the lower appellate Court must, therefore, be reversed and that of the first Court restored, with costs throughout.

G. B. R.

Decree reversed.

(1) 3rd Edn.

(2) 2nd Edn.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Russell.*

SHIVLINGAPPA BIN BASAPPA (ORIGINAL PLAINTIFF), APPELLANT, v.
CHANBASAPPA BIN FAKIRAPPA AND ANOTHER (ORIGINAL DEFEND-
ANTS), RESPONDENTS.*

1905.
December 1.

*Civil Procedure Code (Act XIV of 1882), secs. 276 and 305—Execution of
decree—Attachment—Private sale pending attachment—Suit by vendee for
recovery of possession.*

A judgment-debtor having executed a sale-deed of his house pending attachment in execution of a decree and the vendee having subsequently brought a suit to recover possession of the house, the lower Court dismissed the suit holding that section 305 of the Civil Procedure Code (Act XIV of 1882) furnished an answer to the suit.

Held, reversing the decree, that the sale was a private alienation and it operated to convey to the plaintiff the interest of the vendor in the property the deed purported to pass. But to prevent frauds on decree-holders, it is provided by section 276 of the Civil Procedure Code (Act XIV of 1882) that "when an attachment has been made by actual seizure or by written order duly intimated and made known in the manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise.....during the continuance of the attachment, shall be void as against all claims enforceable under the attachment." The sale, if made during the continuance of the attachment, would be void to the extent indicated in the section.

Section 305 of the Civil Procedure Code (Act XIV of 1882) is an enabling section and qualifies the prohibition contained in section 276; on compliance with the conditions of that section a private alienation, notwithstanding section 276, becomes absolute even against all claims enforceable under the attachment.

If it did not become absolute under section 305, then it would not be operative against claims enforceable under the attachment, but to that extent would be defeasible.

SECOND appeal from the decision of L. Crump, District Judge of Dharwar, confirming the decree of V. G. Kaduskar, Joint Subordinate Judge.

The plaintiff sued to recover possession of the house in suit, alleging that it was the property of one Ulwappa, the deceased brother of defendant 1; that defendant 2 obtained a money

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decree against defendant 1 for a debt due by his deceased brother and got the house attached in execution of the decree, but that before the Court sale, defendant 1 sold the house to him for Rs. 200 under a registered sale-deed dated the 2nd April 1900; that defendant 2 wrongfully trespassed on a portion of the house, and that both the defendants having refused to deliver possession he brought the present suit.

Defendant 1 denied execution of the sale-deed relied on by the plaintiff, and contended that it was false and without consideration.

Defendant 2 answered that he did not trespass on any portion of the house; that he purchased the house from defendant 1 for Rs. 500 under a sale-deed dated the 5th June 1901, and that he had no knowledge of the sale to the plaintiff.

The Subordinate Judge found that the plaintiff's sale-deed was not proved. He, therefore, dismissed the suit.

On appeal by the plaintiff the Judge confirmed the decree on the following grounds:—

An objection was raised by the respondent's pleader at the hearing of this case which must, I think, prevail. It will be seen that the plaintiff's suit is based on a sale-deed alleged to have been executed by defendant 1 with the sanction of the Court under section 305 of the Civil Procedure Code. The last paragraph of this section runs as follows:

"Provided that no mortgage, lease or sale under this section shall become absolute until it has been confirmed by the Court."

Admittedly the sale-deed was never produced before the Court and no application was made praying for its confirmation. In the ordinary course of practice such documents are produced and the Court's sanction is endorsed upon them; as the sale is not absolute the title cannot be held to have passed, and the alleged vendee cannot maintain this suit against the vendor. The words of the section are imperative and the confirmation of the Court has obviously been made compulsory by the Legislature for the protection of the judgment-debtor. The proper course for the plaintiff was to apply to the Court, in the first instance, for the confirmation of the sale; without having done so he can have obtained no title which can enable him to maintain a suit on the sale-deed. In a case of this nature where the same questions may have to be decided in another proceeding, I think it would be unwise to enter into any discussion on the merits.

On these grounds I confirm the decree and dismiss the appeal with costs.

The plaintiff preferred a second appeal.

Sumitra A. Hattiangdi appeared for the appellant (plaintiff):—
The Judge was wrong in holding that no title passed to us at all

under the sale-deed, as the sale was not confirmed by the Court under section 305 of the Civil Procedure Code. The sale cannot be void as against the whole world. It would be void only against "all claims enforceable under the attachment," section 276 of the Civil Procedure Code. In the present case there was no such claim in opposition to our purchase pending attachment. The judgment-creditor claimed under an independent subsequent sale from the judgment-debtor. It was therefore wrong to hold that the sale to us passed no title: *Anund Loll Doss v. Jullodhur Shaw* ⁽¹⁾.

S. V. Bhandarkar appeared for respondent 1 (defendant 1):—The sale being not confirmed under the last proviso to section 305 of the Civil Procedure Code, it could not pass any title to the plaintiff. Until the sale is confirmed by the Court, the vendee's title is only inchoate and not complete: sections 314 and 316 of the Civil Procedure Code.

H. C. Coyaji appeared for respondent 2 (defendant 2).

JENKINS, C. J.:—The plaintiff sues to obtain possession of a house, alleging a sale-deed executed in his favour by defendant No. 1.

The first Court held the sale-deed not proved.

The lower appellate Court did not go into that question, but considered that section 305 of the Civil Procedure Code furnished an answer to the suit.

From that decision the present appeal is preferred.

As the lower appellate Court came to no finding on the issue whether or not the plaintiff's sale-deed was proved, we must deal with this appeal as though the sale-deed had been proved.

Prima facie, a sale-deed executed by one person in favour of another operates to convey to that other the interest of the executant in the property the deed purports to pass. But to prevent frauds on decree-holders it is provided by section 276 of the Civil Procedure Code that "when an attachment has been made by actual seizure or by written order duly intimated and made known in the manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, . . . during the continuance of the attachment, shall be void as against all claims enforceable under the attachment."

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The alleged sale-deed on which the plaintiff relies would be a private alienation, and, if made during the continuance of an attachment, it would be void to the extent indicated in the section.

But the view that the plaintiff's title is defective has been based in the judgment of the lower Court and in the argument before us not on section 276, but on section 305 of the Civil Procedure Code.

Assuming, for the sake of argument, that section 305 applies, has it the effect which has been ascribed to it? We think not.

It is an enabling section, and qualifies the prohibition contained in section 276; on compliance with the conditions of that section a private alienation, notwithstanding section 276, becomes absolute even against all claims enforceable under the attachment.

If it did not become absolute under section 305, then it would not be operative against claims enforceable under the attachment, but to that extent would be defeasible.

That appears to us to be the scheme and effect of the Code, and we hold that the learned Judge has fallen into an error in supposing, on the assumptions that he has made, that section 305 furnishes an answer to the plaintiff's claim.

We must send back the case for the determination of the issues and for a re-trial in the light of these remarks; and for that purpose we must reverse this decree and direct that the costs shall be costs in the suit.

Decree reversed and case remanded.

G. B. R.

ORIGINAL CIVIL.

*Before Mr. Justice Chandavarkar.**IN THE MATTER OF THE LAND ACQUISITION ACT I OF 1894.**IN THE MATTER OF RUSTOMJI JIJIBHAI AND ANOTHER.**

1905.

*December 2.**Land Acquisition Act (I of 1894), section 18 (2)—Reference by Collector—
Grounds of objection—Additional grounds urged before Court—Issues.*

Section 18, sub-section 2, of the Land Acquisition Act requires that any person interested who has not accepted the Collector's award and requires the Collector to make a reference to the Court "shall state the grounds on which objection to the award is taken." Such requirement is one of the conditions precedent to the obligation of the Collector to make the reference.

Held, that as section 147 of the Civil Procedure Code applied the claimant to the hearing is not confined to the grounds set out in his notice.

Held, further, that he is entitled to advance claims in respect of portions of the land taken up not referred to in his notice.

REFERENCE by the Collector of Bombay.

The material facts of this case relating to the points decided in that portion of the judgment recorded below are as follows:—

The land belonging to the claimants Rustomji Jijibhai and Sorabji Seodia were compulsorily acquired by the Collector on behalf of Government according to the provisions of the Land Acquisition Act on 6th December 1902. On the 24th February the Collector made his award and apportioned the sum awarded between the claimants above-named and others. The claimant Seodia objected to the award and embodied his objections in a letter, dated 13th April 1904, demanding a reference to the High Court. This letter ran as follows:—

Land Acquisition Act, 1894,

and

Land at Babula Tank Road.

.....
Please take notice that I object to the award made by you in this matter and dated the 24th day of February 1904 on the following grounds:—

That you are in error in holding that the full monthly letting value of the house on plot (11) on the plan H was Rs. 70 per month and the proper number of years purchase to be given for that property was $16\frac{2}{3}$ years and that you ought to have held that the said monthly value was Rs. 75 and the number of

* Reference from Collector of Bombay, No. L. R.—1435 of 1905.

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years purchase was 20. Also that you are in error in allowing 5 per cent. for vacancies and collection in respect of the said house and that you should not have allowed more than 3 per cent. for such purposes.

And in pursuance of section 18 of the above-mentioned Act I request that the above matters be referred by you for the determination of the High Court.

The claimant Rustomji also objected to the award and demanded a reference stating his objections in a letter, dated 14th April 1904, in the following terms :—

Land Acquisition Act, 1894.

Please take notice that I object to the award made by you in this matter and dated the 24th day of February 1904 on the following grounds :—

1. That you are in error in holding that a part of the rents paid by the sub-tenants for the timber depôts forming portion of the above property represents trade profits and that you should have held that the rents paid by the respective occupants of these timber depôts is regulated solely by the position of the respective timber depôts.

2. That you are in error in holding that the full monthly letting value of the house on plot (10) on the plan H was Rs. 70 per month and the proper number of years purchase to be given for that property was 16½ years and that you ought to have held that the said monthly letting value was Rs. 75 and the number of years purchase was 20. Also that you are in error in allowing 5 per cent. for vacancies and collections in respect of the said house and that you should not have allowed more than 3 per cent. for such purposes.

3. That you are wrong in valuing the vacant land forming plot 2 on the said plan H at only one-half the rate at which you have valued the land occupied by the tenants of the timber depôts and that you should have valued the said vacant land at the same rate as the back part of the land occupied by the timber depôts.

And in pursuance of section 18 of the above-mentioned Act I request that the above matters be referred by you for the determination of the High Court.

The claimant Rustomji's Solicitors subsequently wrote the following letter, dated 2nd June 1905, to the Government Solicitor :—

Land Acquisition Act, 1904,

and

Land at Babula Tank Road.

Dear Sir,

Referring to the notice of the 12th April 1904 given to the Collector under section 18 of the above Act by Mr. Rustomji Byramji Jijibhoy, one of the persons interested in the above land, stating his objection to the amount of compensation awarded to him for the land, we beg to state that, in addition to the grounds of objection contained in the above notice, Mr. Rustomji Byramji Jijibhoy objects to the amount of compensation awarded him on the following

grounds, viz., that in valuing the stable property the Collector ought to have taken 16 and $\frac{2}{3}$ years purchase of the rents received for the said stable property and not $11\frac{1}{2}$ years purchase only, and that in valuing the land available for timber depôts the Collector should have included in his valuation the piece of vacant land marked No. 7 on the plan exhibit H and lying to the north of the Chawl No. 6.

These objections will be urged before the High Court under the reference.

The Collector by a notification, dated the 18th March 1905, referred the matter to the High Court. When the case came on for hearing, counsel for the claimants raised the following issues:—

1. What are the correct rentals of the houses on plots (10) and (11)?
2. What are the proper deductions for (a) vacancies and collections and (b) repairs in respect of the said houses?
3. What is the correct number of years purchase to be allowed in respect of the rent of the said houses?
4. What is the correct value of the said houses and of each of them?
5. What is the correct life to be assigned to the stables?
6. What is the correct number of years purchase to be allowed in respect of the rents of the said stables?
7. What is the correct value of the said stables?
8. Whether plots (3) and (4) should not be valued according to the ultimate rents obtained for such plots, plot (3) to include (3-a) and (3-b)?
9. Whether the area of plots (2) and (5) valued by the Collector should not be valued on the same basis as plots (3) and (4)?
10. Whether plot (7) should not be valued on the same basis as plots (3) and (4)?
11. Whether $28\frac{1}{2}$ years purchase is not the correct number of years purchase in respect of the rents of plots (3) and (4) and (9)?
12. What is the value of plots (2), (3), (4), (7) and (9) respectively?
13. General issue.

Issues raised on behalf of Government:—

14. Whether the claimants are entitled to raise any and which of the issues which have been raised having regard to the provisions of section 18 of the Land Acquisition Act?

15. Whether the amount awarded by the Collector is not sufficient?

Issue 14 was tried as a preliminary issue.

Strangman with Inverarity for the claimants:—We are entitled to raise issues on any point connected with the Collector's award once the reference is made to this Court. The claimants' letters set out certain objections to the award to satisfy section 18 of the Act and to enable the Collector to make a reference. Once

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the reference is made we are at liberty to open up the whole case *de novo* and are not restricted to the specific objections set out in the claimants' letters to the Collector demanding the reference. *Ezra v. Secretary of State for India*⁽¹⁾.

Scott (Advocate-General) with *Kirkpatrick* for Government :—
The claimants cannot be allowed to travel outside the objections specified in their letters demanding this reference.

Those letters are in the nature of pleadings in a suit and the rules as to issues thereon apply to issues raised on those letters.

We contend further that under section 18 (2) (a) of the Act the claimants are barred from relying on the objections raised in their solicitors' letter of the 2nd June 1905 as that was written more than six weeks after the date of the award, and this argument applies with still greater force to issues raised on objections which have only been made for the first time in Court and for which we are not prepared.

CHANDAVARKAR, J.—This is a reference by the Collector of Bombay, made under the provisions of section 18 of Act I of 1894, for the determination by this Court of the amount of compensation for a land with buildings standing thereon in the vicinity of the Sir J. J. Hospital. The land in question was compulsorily acquired by the Collector according to the provisions of the Act by a declaration published in the *Bombay Government Gazette* on the 6th of December 1902. The Collector by his award, dated the 24th of February 1902, and made under section 23 of the Act, adjudged Rs. 3,09,266-6-7 as the total amount of compensation to be paid for the land and buildings thereon, and directed that amount to be apportioned among the claimants as follows :—

To Rustamji Byramji Jijibhoy	...	...	...	Rs. 2,75,595-10-10
To the Official Assignee on behalf of the insolvent				
Borah Nurbhai Gazikhan	...	...	...	14,329-5-2
To Edulji Framji Motivala	...	...	...	9,452-2-0
To Sorabji Cowasji Seodia	...	...	...	9,889-4-7

On the 1st of March 1904, the Collector gave notice of his award to the persons abovementioned ; and, as is admitted before me by the parties concerned, the notice was received on the 4th of March 1904.

¹⁾ (1905) 32 Cal. 605.

Of the four claimants, two, *viz.*, the Official Assignee on behalf of the insolvent Borah Nurbhai Gazikhan, and Edulji Framji Motivala, accepted the award.

Sorabji Cowasji Seodia, however, by a written application to the Collector, dated the 13th of April 1904, required him, under the provisions of section 18 of the Act, to refer the matter for the determination of the Court, his objection being to the amount of the compensation. The grounds on which the said objection was taken were stated in the application, as required by sub-section 2 of section 18.

On the 14th of April 1904, Rustamji Byramji Jijibhoy followed with his written application to the Collector under section 18. He also objected to the amount of the compensation and stated his grounds, which had reference to other parts of the land than those which formed the subject-matter of Sorabji Cowasji Seodia's application.

The Collector accordingly made this reference on the 18th of March 1905.

On the 2nd of June last Rustomji Nanabhoy Byramji's Solicitors informed the Solicitor to Government that in addition to the grounds of objection stated in his written application, he objected to the amount of compensation awarded to him on other grounds also. The grounds are stated in the Solicitors' letter.

Mr. Strangman, appearing for the claimant, Rustomji Nanabhoy Byramji Jijibhoy, has raised new issues, with reference to the amount of compensation awarded to him by the Collector, involving not only the grounds of objection stated in Mr. Rustomji's written application to the Collector, but also the additional grounds stated in his Solicitors' letter.

The learned Advocate General, appearing for Government, has raised the preliminary objection that these additional grounds are not open to the claimant upon this reference and that he must be confined to the grounds of objection stated in his written application to the Collector.

Section 18, sub-section 2, no doubt requires that any person interested, who, having not accepted the Collector's award, requires the Collector to make a reference to the Court, "shall state the grounds on which objection to the award is taken." Such requirement is one of the conditions precedent to the

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obligation of the Collector to make the reference. But there is no provision in the Act which expressly lays down that the claimant in question should be confined to those grounds by the Court in determining his objection. It is usual in statutes to find provisions of that kind. For instance, section 542 of the Code of Civil Procedure provides that an appellant shall not without the leave of the Court urge or be heard in support of any other ground of objection than the grounds set forth in his memorandum of appeal. The omission in Act I of 1894 of a provision similar to that contained in the Code of Civil Procedure with reference to appeals affords an argument of weight in support of Mr. Strangman's contention and it must be upheld unless, having regard to the context of the different provisions of Act I of 1894, its object and its policy, there is a necessary implication that the Legislature intended to confine a claimant to the grounds set forth in his written application to the Collector.

On the question of such intention it is, however, to be remarked that, while section 18 requires that a claimant objecting to the award and desiring a reference shall state the grounds of objection in his written application to the Collector, section 19, clause (d) requires the Collector, in making the reference, to state the grounds on which the amount of compensation was determined by him, if the claimant's objection be to such amount. Now, if the Legislature intended that the Court, in hearing the reference, should confine itself to the grounds of objection set forth by the claimant in his written application to the Collector, why did it not say in section 19, clause (d) that the Collector shall confine himself to those grounds and give his reply to them, "for the information of the Court"? Further, sections 23 and 24 lay down matters which the Court shall or shall not take into consideration. There is no reference in them to the claimant's grounds of objection set forth in his written application to the Collector. Again, section 53 provides that "save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act." According to that Code (see section 147) the Court may frame issues not merely from the plaint or written statement but from allegations made by the parties or by any persons present on their behalf or

by their pleaders. If the written application to the Collector is tantamount to a plaint,—and it cannot be treated as anything less than a plaint in a suit—what is there in Act I of 1894 which takes away from a claimant the right he has according to section 53 of that Act to invoke the aid of section 147 of the Civil Procedure Code?

It is true that the land in this case which has been compulsorily acquired by the Collector and which forms the subject-matter of his award is divided into plots, and that whereas the claimant's written application, made to the Collector under section 18, sub-section 2, set forth grounds of objection to the amount of compensation which had reference not to all but only one of the plots, his Solicitors' letter relied upon grounds which touched another plot or parcel of the land. And it is this which the learned Advocate General contends the claimant cannot be allowed to do. His argument is that the claimant must be confined to the plot mentioned in his written application. The answer to that, however, is that the Act speaks of the land as a whole and the amount of compensation awarded in respect of it. The claimant objects to that amount and though the Act requires him to state his grounds of objection in his written application to the Collector, and though such ground may refer only to a part of the land, the Act by section 19, clause (d), substantially makes it incumbent upon the Collector to state his grounds for awarding the amount with reference to the whole land, and not to that particular part.

In my opinion, therefore, the provisions of sub-section 2 of section 18 are merely a condition precedent to the Collector's reference; and that after the Collector has made the reference, their operation ceases, and the Court in dealing with it has to act in accordance with sections 23 and 24 of the Act and the provisions of the Code of Civil Procedure so far as these apply.

Attorneys for the claimant: *Messrs. Craigie, Lynch & Owen.*

Attorney for Government: *Mr. E. F. Nicholson*, Government Solicitor.

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THE INDIAN LAW REPORTS. [VOL. XXX.]
CRIMINAL REVISION.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Russell.

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December 5.

EMPEROR v. HUSSEIN NOOR MAHOMED AND OTHERS.*

*Bombay Prevention of Gambling Act (Bom. Act IV of 1887), section 12⁽¹⁾
—Gambling in a railway carriage—Through special train—Public place—
Railway track—Public having no right of access except passengers.*

The accused were convicted under section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) as persons found playing for money in a railway carriage forming part of a through special train running between Poona and Bombay, while the train stopped for engine purposes only at the Reversing Station (on the Bore Ghauts between Karjat and Khandála Stations) of the Great Indian Peninsula Railway.

Held, reversing the conviction, that a railway carriage forming part of a through special train is not a public place under section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887).

Per JENKINS, C. J.:—The word “place” [in section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887)] is, I think, qualified by the word “public” and having regard to its context and its position in that context, it must, in my opinion, mean a *place* of the same general character as a *road* or *thoroughfare*. I am unable to regard the railway carriage, in which the accused were, as possessing such characteristics of, or bearing such a general resemblance to, a street or thoroughfare as to justify us in holding that it was a public place within the meaning of section 12 of the Act, with which alone we are concerned.

* Criminal application for revision No. 217 of 1905.

(1) Section 12 of the Bombay Prevention of Gambling Act (IV of 1887).

12. A Police officer may apprehend without warrant—

(a) any person found playing for money or other valuable thing with cards, dice, counters or other instruments of gaming used in playing any game, not being a game of mere skill, in any public street, place or thoroughfare;

(b) any person setting any birds or animals to fight in any public street, place or thoroughfare;

(c) any person there present aiding and abetting such public fighting of birds and animals.

Any such person shall, on conviction, be punished with fine which may extend to fifty rupees, or with imprisonment which may extend to one month.

And such Police officer may seize all birds and animals and instruments of gaming found in such public street, place or thoroughfare or on the person of those whom he shall so arrest, and the Magistrate may, on conviction of the offender, order such instruments to be forthwith destroyed, and such birds and animals to be sold and the proceeds forfeited.

Per RUSSELL, J.—The adjective “public” [in section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887)] applies to all the three nouns—street, place or thoroughfare, and it is clear that the railway line certainly cannot be described as a “public street or thoroughfare” inasmuch as it is not and cannot be used by the public in the same way as they are in the habit of using “public streets” and “thoroughfares”.

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CRIMINAL application for revision of convictions and sentences recorded by K. V. Joshi, First Class Magistrate of Mával at Vadgaon in the Poona District, in case No. 221 of 1905.

On the 2nd September 1905 the accused were travelling in a Second Class Railway carriage of a through special train running from Poona to Bombay. The train ran direct to Bombay and took no passengers at any intermediate stations between Poona and Bombay. During the season of the races at Poona, the Great Indian Peninsula Railway Company started such trains from Bombay to Poona if a sufficient number of passengers offered beforehand to travel by them. The train in which the accused were travelling stopped for the purposes of the engine only at the Reversing Station in the Bore Ghauts between Karjat and Khandála Stations, and while this train was standing the Police raided the carriage in which the accused were travelling and found them sitting round a piece of cloth bearing various devices thereon as heart, anchor, crown, &c., and engaged in what is known as the heart, anchor and crown game with dice and money. It was a game of chance and not a game of skill. The accused were thereupon arrested and tried by the First Class Magistrate of Mával in the Poona District. The Magistrate found that the place where the accused were playing was a “public place” within the meaning of section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) and on the 5th October 1905 convicted and sentenced accused No. 8 to rigorous imprisonment for one month, because he was considered to be the ring-leader and accused Nos. 1—6 to pay a fine of Rs. 40 each. Accused No. 7 was acquitted. The following are the reasons given by the Magistrate for holding that the carriage in which the accused were travelling was a “public place” :—

The accused are said to have been found gambling in a railway carriage of the race special second class which ran * * from Poona to Bombay. The question for determination is therefore whether such a carriage comes within

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the meaning of the words "public street, place or thoroughfare." There are no definitions given in the Act of these expressions; nor are there Indian rulings to guide this Court in determining the above question. Certainly a railway carriage will not be a public street or thoroughfare. But it is to be seen whether it can be a public place or not. The English case, *Langrish v. Archer* (10 Q. B. D. 44) is I think on all fours with this case though the latter has some special circumstances attending on it. In that case it was held that a railway carriage while travelling on its journey is within the definition of "an open and public place to which the public have or are permitted to have access" in the section (3 of the Vagrant Act Amendment Act, 1873—36 and 37 Vic. c. 38). Though we have not got the same words in our section 12 of the Gambling Act, the expression "public street, place or thoroughfare" carries, I think, the same meaning. It is contended on behalf of the defence that the conviction in that case was secured because there were in that case the additional words "any open place to which the public have or are permitted to have access." But from the opinions given by some of the Judges in that case about the case of *Ex parte Freestone*, which was decided before the additional words were inserted, I think that this contention does not hold good. Lord Coleridge, C. J., had said "in *Ex parte Freestone* where it was held that a conviction upon 5 Geo. IV, c. 83, s. 4, for playing cards in a railway carriage must be set aside because it was not shown affirmatively that the carriage was being used for the conveyance of passengers, there is a strong intimation of opinion that if this evidence had been forthcoming the conviction would have been sustained." Another Judge, Stephen J., gives his opinion in the following words: "I am of the same opinion. Although it was not actually decided in *Ex parte Freestone* that a railway carriage while in the act of conveying passengers was an open and public place within 5 Geo. IV, c. 83, it may be inferred that if the facts had raised the question, the Court would have decided it in the affirmative."

* * * * *

It is further contended on behalf of the defence that the train in which the accused travelled was a race special, and that as passengers were not allowed to get in at intermediate stations between Bombay and Poona and between Poona and Bombay, the carriages of that train would not come within the meaning of the word "public place". Mr. Muirhead, the Traffic Manager of the G. I. P. Railway Company, was examined as to rules and orders in connection with the running of Race specials. From the evidence and documents produced, it appears that the stoppages of these trains at Karjat, Reversing and Lonávla are for engine purposes only and that they are not to stop at any intermediate stations to pick up or set down passengers. Had it been possible to run these trains without stoppages for engine purposes they would have run between Bombay and Poona as ordinary trains run between two stopping stations where passengers are picked up and set down. Such being the case the argument for the defence that public had no access to these race specials has no significance. Like ordinary trains the public have access to these race

specials both at Bombay and Poona. At the former for second class race specials sufficient passengers have to offer the day before the train is due to run. At the latter passengers were booked on payment of single journey fare provided there is room. It is nowhere ordered that a particular class of passengers are to travel by these trains. Any man can join it at Bombay if he offers the day before and any man can get into it at Poona if there is room available. The condition of offering oneself at Bombay the day before the train is due to run, is imposed only in order that the Railway authorities may know beforehand whether there are sufficient passengers to run a train. In these circumstances I do not think that the race specials differ in any way from the ordinary trains in point of access to the public.

Against the said convictions and sentences the accused applied to the High Court under its criminal revisional jurisdiction urging *inter alia* that section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) was not applicable, that the Magistrate erred in holding that the Railway carriage in which the accused were travelling was a "public place" within the meaning of the section notwithstanding the fact that the carriage was attached to the Poona race-express which admitted no passengers on its journey between Bombay and Poona and *vice versa* and that the Magistrate was wrong in holding that the said Act applied to the spot where the accused were arrested. The application was admitted and a notice was issued to the District Magistrate of Poona intimating that the High Court had decided to hear the application on the date mentioned in the notice or thereafter.

Branson (with *F. Oliveira*) appeared for the applicants (accused):—The main question is whether the carriage in which the accused were travelling was a public place within the meaning of section 12 of the Bombay Prevention of Gambling Act. The expression in the section is "public street, place or thoroughfare." Taking into consideration the position of the term "street" in the expression and the adjective "public" preceding the three terms "street, place or thoroughfare", we contend that the term "place" means a public place such as a street or a thoroughfare, Maxwell on Statutes, 3rd edition, p. 461. The meaning put by the Magistrate on the term "place" cannot be sustained. The Magistrate has expressed his opinion that a railway carriage is not a public street or a thoroughfare. If so,

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how can a railway carriage to which the public in general have no access be a public place within section 12 of the Act? Further the Act being penal its sections must be very strictly construed. The Magistrate failed to do so and has given to the section a wider scope by drawing upon section 3 of the Vagrant Amendment Act, 36 and 37 Vic. c. 3. The words of that section are wider than those of section 12 of the Bombay Prevention of Gambling Act. The Magistrate was not justified in importing the words of the English statute in the Gambling Act.

If a railway carriage attached to an ordinary train is not a public place within the meaning of section 12, much less will be so a carriage attached to a race special which took only a limited number of passengers and did not stop at any intermediate station between Poona and Bombay. Such a train having once started the public can have no access to it.

Ráo Bahádúr V. J. Kirtikar, Government Pleader, appeared for the Crown :—The expression “public street, place or thoroughfare” in section 12 of the Bombay Prevention of Gambling Act is wide enough to include a railway carriage on the line. The railway line is, according to the scope of section 12 of the Act, a thoroughfare. The Act makes gambling in a public place or thoroughfare penal. Therefore the conclusion arrived at by the Magistrate was correct. The carriage in which the accused travelled was not reserved for the party of players. There were other persons in the carriage who did not take any part in the play.

JENKINS, C. J.—The accused in this case have been convicted as being persons found playing for money against the provisions of section 12 of the Bombay Prevention of Gambling Act, 1887, in a railway carriage forming part of a through special train running between Poona and Bombay.

The only question is whether it was in a public place that the accused were so playing. This depends on the meaning the word “place” has in section 12 of the Act. The word “place” is, I think, qualified by the word “public” and having regard to its context and its position in that context, it must, in my opinion, mean a place of the same general character as a road or thoroughfare, else it was pointless to use the words street or thoroughfare

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as they are there used. To the Railway track as such the public have no right of access except as passengers in the Company's train. Therefore I need not seriously consider the suggestion that the accused were found playing in a public place, because the carriage in which they were playing was on the railway track. To support the conviction it must be shown that the railway carriage was a public place of the same general character as a public street or thoroughfare. I would be slow to place on the section an interpretation that would curtail its legitimate scope, but I am unable to regard the railway carriage, in which the accused were, as possessing such characteristics of, or bearing such a general resemblance to, a street or thoroughfare as to justify us in holding that it was a public place within the meaning of section 12 of the Act, with which alone we are concerned.

The conviction and sentence must therefore be set aside and the fine, if paid, refunded.

RUSSELL, J.—In this case the accused were charged and convicted of the offence of gambling in a Special Race Train on the way from Poona to Bombay on the 2nd day of September 1905. The train was a second class one and the Police made their raid on it at what is well known as the "Reversing Station" between Khandála and Karjat. The game they were playing was one known as Heart Crown and Anchor and it was not disputed before us that they were gambling.

The only question is were the accused gambling in "a public street, place or thoroughfare" within the meaning of section 12 of the Bombay Gambling Act.

In the Court below and before us the case was argued as if the only point was whether the carriage, in which the accused were, comes within those words in the section. But it appears to me that there are two questions involved.

1. Was that part of the railway line on which the train was where the accused were arrested, "a public street, &c."

2. Was the carriage in which the accused were playing "a public street, place or thoroughfare."

I propose to deal with these two points in their order.

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If either of these questions is answered in the negative the conviction is bad and must be set aside.

1. In my opinion Mr. Branson was correct in saying that the adjective "public" applies to all the three nouns—street, place or thoroughfare and it is clear that the railway line certainly cannot be described as a "public street or thoroughfare" inasmuch as it is not and cannot be used by the public in the same way as they are in the habit of using "public streets" and "thoroughfares."

Railway Act IX of 1890, section 122, provides *inter alia* "if a person unlawfully enters upon a railway, he shall be punished with fine which may extend to 20 Rs." and "unlawfully" seems to mean without the leave of the railway administration: see the second clause of this section. Section 125 provides a penalty when the owner or person in charge of any cattle permits them to stray on a railway provided with fences suitable for exclusion of cattle. Section 13 provides for the railway administration putting up (a) boundary marks or fence, (b) works in the nature of a screen near to or adjoining the side of any public road for the purpose of preventing danger to passengers on the road by reason of horses or other animals being frightened by the sight or noise of the rolling-stock moving on the railway; (c) provides for the erection of suitable gates, chains, bars, stiles or handrails where a railway crosses a public road or the level and (d) provides for the employment of persons to open or shut such gates, chains or bars. These provisions, in my opinion, clearly show that the Legislature did not intend the premises of a railway to be public and therefore it is impossible to describe the railway line and the ground adjoining it between the places as either a public street, place or thoroughfare. This view is borne out by the case of *Imperatrix v. Vannali and others*⁽¹⁾, where a company which owned a mill on the one side of the B. B. & C. I. Railway and a ginning factory on the other, and whose servants had entered on the railway premises without permission of the Railway Company to repair a pipe (which had been laid beneath the railway line) and reservoirs (built on each side to preserve the proper level of water), and it was

(1) (1896) 22 Bom. 525.

held by this Court that as the pipes and reservoirs belonged to the mill company and were kept in repair by them, they as owners of the dominant tenement, had a right to enter on the premises of the railway company, the owners of the servient tenement, and effect any necessary repairs, and that the entry in question being in the exercise of that right, could not be called unlawful. The Magistrate in this case had convicted the accused under section 122 of the Railway Act (IX of 1890) and sentenced them to a fine of four annas each. Parsons, J., in delivering his judgment observed: "But it appears to us that as the pipe and reservoirs belong to the (mill) company, and are kept in repair by them, they, as the dominant owners, would have a right to enter on the premises of the Railway Company, the servient owners, to effect any repairs that might be necessary. See the Indian Easement Act, section 24, and Illustration (a), and *Colebeck v. Girdlers Company* ⁽¹⁾. The evidence shows there was such necessity at this time, the flow of the water through the pipe being stopped. An entry in exercise of a right cannot be called unlawful". From this case it follows that an entry upon railway premises not in exercise of a right or by permission of the railway administration would be unlawful: compare *Foulger v. Steadman*, ⁽²⁾ where a cab driver was held not justified in refusing to leave the Railway Company's premises when requested on behalf of the company to do so although he believed himself entitled to remain thereon because other drivers did so on payment of certain sums to the Railway Company.

It would be impossible for the Railway Company to work its lines were we to hold that the public should have access to them inside the fences without the permission of the company. The place at which the accused were caught gambling, *viz.*, the Reversing Station (at which from the evidence it is clear the train stopped for engine purposes only) was not a place generally accessible to the public, who would not have any right without the permission of the Railway Company to be on the line at all.

2. The next point to consider is whether the Race Train in which the accused were caught at the Reversing Station was a "public place".

(1) (1876) 1 Q. B. D. 234.

(2) (1872) L. R. 8. Q. B. 65.

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Looking at all the circumstances under which the train was being run and the evidence of Mr. Muirhead I am of opinion that it was not. It was a *Special* train—not bound to run unless a sufficient number of passengers applied, it took no passengers in between Poona and Bombay, and I cannot think that it would be described as a train for the “public” carriage of passengers. At the same time a good deal of the evidence that was given was irrelevant, the point to be decided being whether the train at that place, *i. e.* the Reversing Station could be called a “public place”. What it might be at other places between Poona and Bombay seems to my mind irrelevant.

Several cases were referred to in course of the argument. The first was *Langrish v. Archer* ⁽¹⁾ where it was held that the railway carriage while travelling on its journey was an “open and public place” or “an open and public place to which the public have or are permitted to have access”.

Now if the words in the statute before us were the same as in that, of course the accused would have been rightly convicted, but in the statute there referred to (36 & 37 Vic., c. 38), the words used are “open place to which the public have or are permitted to have access.” The judgment of Lord Coleridge shows that if these words had not been used the decision would have been the other way.

In *Ex parte Freestone* ⁽²⁾ the prohibition (St. 5 Geo. IV, c. 83, s. 4) was from playing or betting “in any street, road, highway or in any other open or public place” and the conviction alleged that the defendants played in an open and public place, to wit, a third class carriage used on the L. B. and S. C. Railway. It was held that the conviction could not be supported as it did not appear that the carriage was then used for the conveying of passengers. There Alderson B. says “these convictions ought to be framed strictly within the words of the Act, the object of which was to prevent nuisances and gambling in the public highways.” It was also held that it was consistent with the conviction that the offence might have taken place in the third class carriage which although occasionally used on the Railway was

(1) (1882) 10 Q. B. D. 44.

(2) (1856) 25 L. J. M. C. 121

then shunted away in the yard. There however the words used "other open and public place," appear to me to distinguish that case from the present one.

In *Emperor v. Jusab Ally* ⁽¹⁾ Mr. Justice Batty who delivered the judgment says at page 389, referring to 36 & 37 Vic. c. 38 and s. 12 of the Bombay Gambling Act; "In these two enactments, however, the offence is, not that the individual members are making a profit at all, but simply that they are carrying on their gambling with such publicity that the ordinary passer-by cannot well avoid seeing it and being enticed—if his inclinations lie that way—to join in or follow the bad example openly placed in his way. In the one case comparative privacy for profit, in the other the bad public example and accessibility to the public, would seem to constitute the gravamen of the offence. Thus, the very fact that special accommodation and privacy had been furnished, which would be essential in a case under section 4 of the Bombay Gambling Act, would be a ground for excluding the case from the purview of section 12. If people *gratuitously* allow gambling on their private premises, the law does not interfere with them, presumably because in that case they have no special inducement to tempt outsiders to join them. The law does interfere, however, if, whether for private gain or not, they expose temptation where the general public have a right to come."

In *Khudi Sheikh and others v. The King Emperor* ⁽²⁾ it was held that the word "place" as used in section 11 of the Gambling Act, (Bengal Code, 2 of 1867) must be a public place and was *ejusdem generis* with the other words in the section, public market, fair, street or thoroughfare. Consequently a *thakurbari* surrounded by a high compound wall is not a public place as contemplated by that section. In that case the learned Judge says:—"The place must be of the same character as public market, fair, street or thoroughfare. Now the gambling in this case took place within a *thakurbari* surrounded by a high compound wall. It is not a place where any member of the public is entitled to go. The Sub-Divisional Magistrate,

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(1) (1905) I. L. R. 23 Bom. 386 : 7 Bom. L. P. 332.

(2) (1901) 6 Cal. W. N. 33.

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who convicted the accused, has held that it is a public place because 'anybody and everybody was allowed to go in and come out'. The ground, as stated by the Magistrate, cannot be supported. Though in a *thakurbari* belonging to a Hindu anybody and everybody would be allowed to go in, yet the owner of the *thakurbari* is entitled to prevent any particular individual going in if he so chooses and as a matter of fact men who are not Hindus are not allowed to go into a *thakurbari*." See also *Durga Prosad v. The Emperor* ⁽¹⁾. I am therefore of opinion, taking the object of the section before us to be what Mr. Justice Batty says it is the mischief aimed at by that section cannot possibly be said to have risen in the present case. The second class carriage in a Special train in which the accused were playing cannot in my opinion be considered to be a "public place" within the meaning of the Act. To get to that carriage it would be necessary to trespass upon the line unless the person so doing had permission from the Railway Company to cross the line. It is well-known that persons standing on the line could not possibly see into the carriages in which these people were gambling.

Under these circumstances I am of opinion that to call or describe either the railway line at the spot in question or the carriage in which the accused were playing as coming within any of the terms, "public street, place or thoroughfare" would be to place a wrong interpretation upon those words.

For these reasons I am of opinion that the conviction recorded and sentence passed upon the accused must be set aside. Fine, if paid, to be refunded.

Conviction and sentence reversed.

G. B. R.

(1) (1904) 8 Cal. W. N. 592.

ORIGINAL CIVIL.

*Before Mr. Justice Batchelor.*SHAPURJI BEZONJEE MOTIWALLA (PLAINTIFF) v. DOSSABHOY
BEZONJEE MOTIWALLA AND OTHERS (DEFENDANTS).*

1905.

December 9.*Parsi Intestate Succession Act (XXI of 1865)—Law governing Parsees in the mofussil before the introduction of the Act—Rules of equity and good conscience—Practice of English Equity Courts.*

Before the passing of the Parsi Intestate Succession Act, 1865, the law governing Parsees in the mofussil was the ascertained usage of the community modified by the rules of equity and good conscience. It is true that in such cases the practice of the English Equity Courts would also be followed with necessary modifications, but the reference to these Courts would be not for the purposes of introducing special or peculiar doctrines of English law, but rather with the purpose of elucidating the principles of equity and good conscience and of giving uniform effect to them.

Before the passing of the Succession Act a Parsee husband did not acquire that particular right which in English Law accrued to a husband over his wife's personalty.

ORIGINATING summons.

One Aimai *alias* Bachoobai died at Bombay on the 25th April, 1886, leaving her surviving two daughters: Goolbai and Motibai. Prior to the 4th March, 1865, (the day on which the Parsi Intestate Succession Act, XXI of 1865, was passed), Goolbai was married to Shapurji Bezonji Motiwalla (plaintiff) and Motibai to Dossabhoj Bezonji Motiwalla (defendant No. 1).

At or before the respective marriages of Goolbai and Motibai, their relations made to them and their husbands the customary presents which belonged in accordance with the custom of the Parsee community to the said Goolbai and Motibai and their husbands as joint tenants. The said presents were allowed by Goolbai and Motibai and their husbands to remain with Aimai.

Aimai, before her death, made a will, probate whereof was, on the 8th September, 1886, granted by the District Court of Poona to Goolbai and Motibai, executrices of the will.

The clauses of the will material to the present report ran as follows:—

"5. A large sum of money has been claimable from me about 21 years past in respect of customary presents and presents from the house of the parents-in-

* O. C. J. Suit No. 473 of 1905, O. S.

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law in connection with the marriage of my daughters and sons-in-law and for presents on other auspicious occasions. In return (in consideration thereof) and in consideration of my love as mother, I give (bequeath) in equal shares to my two daughters the said Motibai and Goolbai for their personal and special use my immoveable properties which are situated in the camp at Poona and the particulars whereof are as follows.....To the same the claim of their husbands and of their creditors shall not prevail at all.

"7. Should the death of either of my two daughters take place which may God forbid and should she have children or issue then the inheritance and share coming to her portion shall remain in the hand of her husband and the same shall be divided in equal shares to the children of the deceased when they attain the age of 21 years but should any such deceased daughter have no issue then the income appertaining to her share or portion shall be paid to her share or portion should he be alive and the present and subsequent husband of the said daughter shall not be at all entitled to the principal but on his decease taking place my other surviving daughter and her heirs shall duly get the said principal. To the same no other person has any right whatever."

In 1886, the executrices, Motibai and Goolbai, sold one of the immoveable properties which had been mortgaged to the mortgagee and thereafter divided the income of the remaining two properties in equal shares between themselves.

Motibai died on the 17th April, 1891, intestate and leaving her surviving the defendants, her husband, sons and daughters as her sole heirs. After her death, the income of the property was divided between Goolbai and the husband of Motibai in equal shares.

Goolbai died on the 24th August, 1900, intestate and without issue, leaving the plaintiff, her husband, her sole heir.

After the death of Goolbai, the two remaining properties left by Aimai were sold by the plaintiff and the defendants: and the proceeds were invested in Government paper. Then there arose a difference of opinion between the plaintiff and the defendants about this money: the plaintiff contended that under the will of Aimai and in the events which had happened Goolbai and Motibai took absolute interests as tenants-in-common in equal shares of the said property and that on the death of Goolbai the plaintiff became entitled absolutely in his marital rights or as her heir to her moiety; and the defendants contended that the plaintiff was only entitled to a life-interest in a moiety of the income of the said property.

To settle this dispute, the plaintiff took out an originating summons on the 6th July, 1905, for the determination of the following questions:—

1. Who are the persons now entitled to the property in the plaint specified and now representing the property devised by the clauses of the will of Aimai in the plaint set out.
2. What interests and in what shares the persons entitled to the property take the same.
3. Whether the said property or any and what parts thereof is now distributable among the parties to this suit.
4. If so, how is the same distributable.
5. What provision should be made for the costs of this suit and Originating Summons.

Raikes and Lowndes, for the plaintiff.

Inverarity and F. S. Talegarkhan, for defendants 2 to 6.

BACHELOR, J.:—This was an originating summons which has been remanded into Court.

Before the coming into operation of the Parsee Succession Act, 1865, or of the Indian Succession Act, one Gulbai, the daughter of Aimai, was married to the plaintiff. Aimai made her will in which she left the property in dispute to the separate use of Gulbai. This property consists of certain lands at Poona and Aimai and her husband were residents of Poona. Aimai died in 1886, when the Succession Acts were in force. Gulbai died intestate in August, 1900, leaving her husband, the plaintiff, and certain nephews.

It is admitted that the plaintiff is entitled to one moiety of the property. But he claims the whole share of Gulbai, and the question is whether he is entitled to it.

As I understand the argument of Mr. Raikes for the plaintiff, the claim is sought to be substantiated in this way. The plaintiff's marriage with Gulbai took place before the Succession Acts of 1865 came into operation, and at that time the law applicable to mofussil Parsees was the English law. But land in the mofussil of India is to be regarded as personalty, not realty; therefore, following the law of England, plaintiff was entitled in law to this property as his wife's personalty, and in equity was trustee on her behalf until her death. On her death without disposing of the property, her separate use was exhausted

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and the plaintiff became the beneficial owner. In support of these contentions reference is made to *In re Lambert's Estate*, *Stanton v. Lambert* ⁽¹⁾.

In my opinion there are several answers to the argument. Admittedly the Succession Act was in operation when the testatrix Aimai died. Mr. Raikes replies that that Act cannot divest rights already vested before it came into force; and that no doubt is so. But the question is, had any rights vested in plaintiff before Aimai's death? I should answer, no. The only rights accruing to Gulbai or the plaintiff accrued under Aimai's will, and that speaks from her death: until that event Gulbai had a mere *spes successionis*. The right was acquired when Aimai died, but then it was subject to the Parsee Succession Act.

Next, I am not satisfied that English law was the law governing the parties before 1865, at least for the purposes required by the plaintiff's argument. The decisions in *Mithibai v. Limji Nowroji Banaji* ⁽²⁾ and *Jehangir Dhanjibhai Surti v. Perozbai* ⁽³⁾ are authorities for the view that, before the Act, the law governing Parsees in the mofussil was the ascertained usage of the community modified by the rules of equity and good conscience. It is true that in such cases the practice of the English Equity Courts would also be followed with necessary modifications (see *Mancharsha v. Kamrunisa Begam*) ⁽⁴⁾, but I take it that the reference to these Courts would be not for the purposes of introducing special or peculiar doctrines of English law, but rather with the purpose of elucidating the principles of equity and good conscience and of giving systematic and uniform effect to them. But whether the doctrine be expressed in the language used in *Mancharsha's* case or in that used in the other cases I have cited, the result appears to me to be that, prior to the introduction of the Succession Acts, no Court would have held that a Parsee husband acquired that particular right which in English law accrued to a husband over his wife's personalty. Such a question as this would, I think, have been decided in the case of a mofussil Parsee not by any technical principle of English law, but by the custom and usage of the community, and it is not alleged

(1) (1888) 39 Ch. D. 626.

(2) (1881) 5 Bom. 506.

(3) (1886) 11 Bom. 1 at p. 4.

(4) (1865) 5 Bom. H. C. R. (A. C. J.) 109.

that the plaintiff has any valid claim under this test. The division of property into 'personalty' and 'realty', as those terms are understood by English lawyers, is not a division which, so far as I am aware, was recognised in the Indian mofussil, and I am shown no authority to indicate that any such recognition was accepted by the Courts. In early days Parsees in Presidency towns were held to be governed by the English law of real property, but this was felt to be a grievance, and was partially removed by Act IX of 1837. That Act was not extended to the mofussil, and the reason appears to be that the Courts had never enforced this branch of English law outside the Presidency towns. Mr. Raikes contends that the non-extension of the Act of 1837 to the mofussil may be explained by the theory that land in the mofussil was always considered to be descendible as personalty; but no decisive authority is cited to sustain this theory, and I prefer the view that the non-extension was due to the fact that among Parsees in the mofussil the special doctrines of the English law of real property were never held to govern.

Thus the plaintiff's claim, as it seems to me, is grounded upon a doctrine of English law which both was and is inapplicable to the parties and the property in suit. The claim must, therefore, be dismissed.

The answers to the questions in the summons will be :

(1) Not answered as to Motibai. As to Gulbai, plaintiff entitled to one half as admitted; the other half to go to defendants 2 to 6.

(2) As above.

(3) Gulbai's share is distributable as above, and defendants 2 to 6 are to have the other half.

(4) As above.

(5) As to costs I order under Rule 261 that the costs be taxed on the same scale as a long cause. Two counsel certified. I think plaintiff must pay for his losing experiment, and must bear all costs.

Attorneys for the plaintiff: *Messrs. Mirza & Mirza.*

Attorneys for the defendants: *Messrs. Kanga & Patel.*

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ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

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SHAW WALLACE & CO. v. GORDHANDAS KHATAO.*

December 18.

Letters Patent, Cl. 12—Leave of the Court—Jurisdiction of the Court to entertain suit—Rules and Forms of the Bombay High Court, Rule 361—Suit against a firm—Addition of the names of partners constituting the firm—Practice and Procedure.

The plaintiffs sued, on the 19th November 1904 on the Original Side of the Bombay High Court, "the firm of Shaw, Wallace & Co. as it was constituted on the 13th September 1898 and the partners in the said firm on that date." The action was for breach of an agreement dated the 13th of September 1898 executed by the defendant firm in favour of plaintiffs at Calcutta. The plaint alleged "the defendants carry on business in Bombay: part of the cause of action arose in Bombay." Prior to the service of summons and pursuant to a chamber order of 22nd December 1904, the plaint was on the 7th January 1905 amended by the addition of the names of Messrs. Wallace, Ashton, Greenway, Hue and Meakin. The first four were at the date of plaint and even afterwards carrying on business: and Secherau, one of the partners, having died in the meanwhile, his executor Meakin was also added as a party defendant. Before the death of Secherau, the partnership took in a new partner: and this new partnership opened a branch office in Bombay. Prior, however, to the presentation of the plaint, leave was granted under cl. 12 of the Letters Patent. It was objected on behalf of the firm that leave under cl. 12 should not have been granted: that the order allowing the amendment was wrong and that the Court had no jurisdiction to receive the suit:—

Held, (1) that Messrs. Wallace, Ashton, Greenway and Hue, according to the allegations in the plaint, were liable as co-partners to the plaintiffs and none the less because the estate of the deceased co-partner might also be liable together with them. It was also stated that they were carrying on business within the jurisdiction and this would be so though there might be associated with them a partner which was not a member of the firm when Shaw Wallace & Co. entered into the agreement on which the suit was based.

(2) That the case fell within Rule 361 of the Rules and Forms of the Bombay High Court.

(3) That the suit as originally framed was rightly received irrespective of leave under cl. 12 of Letters Patent and the defendants' contention that the Court had no jurisdiction failed.

(4) That Meakin, as the executor of Secherau, was wrongly added as a defendant.

* Appeal No. 1405, Suit No. 795 of 1905.

As to the other four defendants the amendment was useless if they were already parties: if they were not then the amendment should not have been made except by an order of a judge seeing that leave had been obtained under cl. 12 of the Letters Patent.

Rule 361 of the Rules and Forms of the Bombay High Court does not extend the jurisdiction of the Court: it merely sanctions the use of the firm's name as a convenient description of its several members and exempts a plaintiff from the obligation of setting forth their names at length.

APPEAL from Judgment of Tyabji, J., in Chambers on a summons to rescind the leave given under cl. 12 of the amended Letters Patent, 1865. Gordhandas Khatao and two others brought this suit on 19th November 1904, on the Original Side of the Bombay High Court for breach of an agreement dated 13th September 1898, against the defendants described as "the firm of Shaw, Wallace and Co. as it was constituted on the 13th September 1898, and the partners in the said firm on that date."

The agreement sued upon was executed by Messrs. Visram Ebrahim & Co. (represented in the suit by Mr. N. C. Macleod, Official Assignee, as plaintiff No. 3) and by the defendants in Calcutta on the 22nd August 1898; and by Gordhandas Khatao and Mulraj Khatao (plaintiffs 1 and 2), Messrs. Visram Ebrahim and Co., and the defendants, in Bombay on the 13th September 1898. The second agreement was executed by the same parties for the purpose of giving effect to the said (first) agreement and guarantee of the defendants.

The plaint stated:—"The defendants carry on business in Bombay and part of the cause of action arose in Bombay." Leave was therefore obtained, prior to the institution of the suit, to file the suit under cl. 12 of the Letters Patent inasmuch as a material portion of the cause of action had arisen in Bombay, and as a safeguard in case some or any of such partners might at the time of filing the said plaint have ceased to be member or members of the said firm as constituted in 1898 and therefore might not then be carrying on business in Bombay.

On the 13th December 1904, the defendants' Solicitors supplied the plaintiffs with the names of those who were partners in the firm of Shaw, Wallace and Co. on the 1st September 1898. On the 7th January 1905, after leave obtained from the Protho-

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notary, the plaint was amended by inserting the names of Messrs. C. W. Wallace, H. S. Ashton, C. Greenway, A. C. Hue and George Meakin (the last named being the Executor of Edmund von Schmidt Secherau), as defendants.

According to the affidavit of Mr. C. Greenway one of the partners, the firm of Shaw, Wallace and Co. as constituted on the 13th September 1898, never carried on business within the jurisdiction of the Court and did not carry on business within such jurisdiction when the suit was filed. The firm as it was constituted on 13th September 1898 ceased to exist on the 1st January 1902 before the plaintiffs' alleged cause of action arose. On 1st January 1902 Mr. E. A. Chettle was admitted as a partner in the said firm. In March 1902 this new firm opened a branch office in Bombay and carried on business there until the 27th August 1903 when E. von Schmidt Secherau died and from that date the remaining partners carried on business at the said branch office in Bombay under the style of Shaw, Wallace and Co. Mr. George Meakin, the Executor of the said Edmund von Schmidt Secherau, did not become a member of the firm and neither resided nor carried on business within the jurisdiction of the High Court of Bombay.

On the 14th April 1905 at the instance of the defendants, the following summons was issued:—

I do order that the plaintiffs or their attorneys do appear before me within four days after service of this summons and show cause why the leave granted under clause 12 of the Letters Patent by the Hon'ble Mr. Justice Tyabji on the 21st of November 1904, to the plaintiffs to file this suit should not be rescinded and why the plaint in this suit should not be taken off the file of this Honourable Court and returned to the plaintiffs and why the plaintiffs should not be ordered to pay the defendants' costs of this suit and of and incidental to this summons and the order thereon or why the suit should not be set down on the board for the hearing of the following preliminary issues:—(1) Whether this Court has jurisdiction to try this suit, (2) whether the leave granted under clause 12 of the Letters Patent should not be rescinded or why in the alternative the Chamber Order, dated the 22nd of December 1904, should not be set aside and the amendments in the plaint purporting to have been made in pursuance thereof should not be struck out and why the plaintiffs should not be ordered to pay the costs thereof and of and incidental to this summons and the order thereon and why in any event the time for filing the defendants' written statement should not be extended until the disposal of this summons.

On the 18th May 1905 the plaintiffs' Solicitors wrote to the defendants' Solicitors that they intended to proceed only against the surviving members of the defendants' firm as constituted in 1898, who were now carrying on business in Bombay, and offering that the name of George Meakin should be struck out and offering to pay the costs of the said summons down to the time of this offer and of the consent order to be taken thereon.

On the 27th May 1905 the defendants' Solicitors replied refusing to accept this offer on the ground that as the estate which Meakin represented would be liable to contribute if any decree was to be passed against the other defendants he would naturally desire for his own protection to remain a defendant to satisfy himself that the suit was being properly defended.

The summons came on for argument before Tyabji, J., in Chambers on 15th July 1905.

Davar and F. S. Talwalkar for plaintiffs.

The present summons has been taken out for rescinding leave granted by this Court under cl. 12 of the amended Letters Patent, 1865. The defendants suggest that the suit should be tried in Calcutta. The plaint, as it originally stood, was against "the partnership of Shaw, Wallace & Co. as constituted on the 13th September 1898."

There are five defendants now on record. So far as defendants 1—4 are concerned this summons is hopeless as they are carrying on business in Bombay.

The fifth defendant is the executor of a deceased partner, and is not carrying on business in Bombay. We are willing to strike his name off from the plaint. The order for adding the names of the parties in the defendants' firm was within jurisdiction. (Reads affidavit of Gordhandas Khatao). The plaint as originally filed was against "the Firm of Shaw, Wallace & Co., as constituted on the 13th September 1898." Then for greater caution, and in order to avoid any question that might arise from defendants ceasing to carry on business in Bombay, we put into the plaint the names of the members who constituted the firm on the 13th September 1898. It is wrong to say that there was any amendment of the plaint after leave had been obtained. From the Letters Patent it is clear that no leave is necessary against

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these defendants that were carrying on business in Bombay. See cl. 12 (Rules and Forms of Bombay High Court, pp. 100-101; 123). This Court has ample jurisdiction to try this suit, and no question of leave arises.

In case the question does arise as to what entitles the Court to try the case, reference should be made to the words of cl. 12. If any portion of the cause of action has arisen in Bombay, the Court has power to grant leave and thus to assume jurisdiction. There are no doubt expressions in judgments that a "material part of the cause of action must have arisen within the local limits." But cl. 12 in no way refers to a "material" part of the cause of action. See *Kessowji Damodar v. Luckmidas Ladh*⁽¹⁾.

[TYABJI, J.—Do you argue that it would be right for the Court to give leave even if a very immaterial part of the cause of action has arisen in Bombay?]

Davar.—No, but see *Musa Yakub v. Manilal*⁽²⁾ which defines "cause of action" as that which plaintiff must prove before he can succeed in the case. In the *Deccan Bank's* case (appeal from Russell, J.) *Deccan Bank v. G. S. Athavale and others* (March 1905, Cor. Jenkins C. J. and Batty J.) the Chief Justice is said to have asked "where do you get 'material' from. The word is not in the clause."

[TYABJI, J.—The word 'material' is supplied by Judges in order to guide themselves when they are considering the advisability of granting leave or not.]

Davar.—The part of cause of action arising in Bombay in the present case is much more material and important than in *Musa Yakub v. Manilal*⁽²⁾: see also *Motilal v. Surajmal*⁽³⁾.

The plaint clearly shows how this Court has jurisdiction: see paragraphs 3 and 6; and these paragraphs are not traversed in the written statement. In the first place the agreement was executed in Bombay; we also say that it was signed on behalf of Visram Ibrahim & Co. in Bombay.

(1) (1889) 13 Bom. 404.

(2) (1904) 29 Bom. 368; 7 Bom. L. R. 20.

(3) (1904) 20 Bom. 167; 6 Bom. L. R. 1033.

Raikes.—That is stated on information without giving the source of information in the affidavit and so the affidavit cannot be used.

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Davar.—There are four parties to the agreement. Gordhandas and Moolraj Khatao are partners in some concerns, not in others. In this agreement they did not join as partners. There are three parties interested on the one side (who signed in Bombay) and one on the other (who signed at Calcutta). The convenience of both sides must be considered. The question in the present case is merely one of construction of agreement. Only one witness possibly will be necessary from Calcutta. The plaint is already filed and so are the written statements.

[TYABJI, J.—The defendants are carrying on business in Bombay—why do you want leave?]

Davar.—We took leave *ex majore cautela* and we took leave probably against the fifth defendant—also probably because we were not aware at that time who were the partners of the firm, and we were not sure whether they would all be residing in Bombay or not.

This suit has been on the file since November 1904, and this summons has only been taken out now.

Raikes (*Strangman* with him) for defendants:—We concede that as against defendants 1—4 individually the suit may lie in Bombay.

Delay is not a material matter and it is, I submit, quite immaterial how long the suit has been on the file.

Two points must be kept distinct: When has the Court jurisdiction absolutely without leave, and when is leave necessary for giving jurisdiction? It is also necessary to see the plaint as it was originally filed. Before the new rules, a suit filed against a firm would not have been accepted, unless the names of the members of the firm had been specified and this style of suing would not now be accepted outside the Ordinary Original Civil Jurisdiction of the High Court (see Rule 361, Rules and Forms of Bombay High Court, and Civil Procedure Code, section 50 (c)).

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[TYABJI, J.—Previous to this rule in the Mofussal Courts firms used to be sued in the firm name till Westropp, C. J., upset that practice. So the Mofussal was in advance of the High Court.]

Raikes.—The rules especially provide that the names of the partners should never be on record : Rules and Forms of Bombay High Court, Rules 361, 362. Then why did they have individual names of the partners on the plaint? See Rules 361-364 and 368 of the Rules and Forms of Bombay High Court. Those are the provisions under which alone the suit could be filed. The debentures in respect of which the suit is filed became due in 1904 and it was then that the cause of action arose. The firm of Shaw Wallace & Co., as constituted on the 13th September 1898, was not in existence, and, consequently, it was not carrying on business in Bombay, at the date of the arising of the cause of action. If there be any dispute as to this a preliminary issue may be raised on the point. There is no rule or any other authority for suing both the firm collectively and the partners individually.

Davar.—Does not the title of every suit run in this way—“A. B. & C. carrying on business in name of the firm of.....”? We have merely put the name of the firm first and given the names of the partners afterwards.

Raikes.—The suit against the partners is very different from suit against the firm.

Leave under clause 12 of Letters Patent was obtained apparently on the statement in the plaint that a part of the cause of action arose in Bombay. Besides paragraphs 3 and 6 of the plaint which say that the agreements were executed in Bombay, there is nothing to show what part of cause of action arose in Bombay. No leave will save the action unless the firm was carrying on business at the time of filing the suit.

The amendment was made *ex parte* (see Rule 138 of Rules and Forms of Bombay High Court).

[TYABJI, J.—To whom could notice of the application for amendment have been served? Defendants had not been served till then. If a plaint is filed on the record, and no summons

nor any other process is served upon the defendants, the matter rests entirely between the plaintiff and the Court. To whom could the notice in the present instance be served? If it had been an ordinary suit I should not hesitate to give leave to amend, as was done here. But of course when leave is obtained, that might affect the question—for leave was granted only for the suit as originally filed. It is of course very perilous to obtain any amendment after the leave is once obtained under clause 12 of the Letters Patent.]

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Raikes.—See also Rule 80 (a), (j), Rules and Forms of Bombay High Court, page 175. Here, by the amendment a new party altogether is brought before the Court. It was absolutely *ultra vires* of the Prothonotary to add another defendant. The Prothonotary was led to think that it was merely a formal amendment. The Prothonotary has no such power as he unconsciously assumed here: section 32 of the Civil Procedure Code.

How could the firm of Shaw Wallace & Co., as constituted in 1898, include George Meakin, the fifth defendant? If it could not, then a new party was added by the amendment. How can it be argued that Meakin was included in the firm?

I also object that this order is against Rule 365 which says that the proceedings shall continue in the name of the firm. When leave is obtained, it applies only to the plaint as filed and not as amended subsequently: *Rampurtab Samruthroy v. Premsukh Chandamal*⁽¹⁾. In that case it was suggested that the plaint should be amended at the hearing.

The case of *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosul*⁽²⁾ is very similar to our case. Here they have sued the firm first of all. Then they sue the partners. Of course there are cases to show that some of partners may be sued. But there is nothing to show that other partners may not come in, and ask that they should also be joined as parties.

[TYABJI, J.—But if they do ask to be made parties they could not object to jurisdiction.]

(1) (1890) 15 Bom. 93.

(2) (1874) 13 Beng. L. R. 91.

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Raikes.—But then, in this case, the nature of suit is altered by such an addition. Originally the suit is on a joint cause of action against the firm—now it is altered to a suit against each partner individually. The only issue you have to try now is: did the defendants Shaw Wallace & Co. carry on business in Bombay when the payment of debentures became due in 1904? On this we submit that there should be a preliminary issue.

It is not necessary to consider whether a material part of the cause of action arose in Bombay. Our argument is that this suit is bad unless the firm carried on business in Bombay in 1904. If your Lordship is with us that leave should be withdrawn, then we ask that a preliminary issue be raised first as to whether the Court has jurisdiction.

[TYABJI, J.—I may point it out to Mr. Davar that the existence of the leave embarrasses the plaintiffs. So long as the fifth defendant was on record no doubt it may have been necessary for the plaintiffs to obtain leave, but once the fifth defendant goes out, the leave will merely embarrass the plaintiffs, and give rise to various questions.]

Raikes.—The suggestion made by your Lordship that leave should be rescinded and that the fifth defendant should be struck off must, we submit, be followed. But if so, we say that the suit should be dismissed.

[TYABJI, J.—You do not ask for that in your summons.]

Raikes.—But that does not matter, for if the leave is rescinded it is open to the defendant to object to jurisdiction even before the case comes on for hearing. If the leave is rescinded then the suit will be against the firm as such (“Shaw Wallace & Co. as constituted on 13th September 1898”) and a suit can be filed as against a firm only under Rule 361. Now that rule says that a firm can be sued as such only if it is carrying on its business in Bombay, and so if it is admitted that the firm was not carrying on business in Bombay, it is clear that there is no jurisdiction in this Court.

[TYABJI, J.—Yes, but under your hypothesis the suit will not be against the firm but against certain individual members.]

Raikes.—But that was not how the suit was filed. If the suit could not have been filed at all, if there was no jurisdiction to accept the plaint, the Prothonotary could have had no power to allow the amendment. If the Prothonotary had no power to allow the amendment, then the defendants individually are not on the record : see *Kessowji Damodar v. Luckmidas Ladha*⁽¹⁾.

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[TYABJI, J.—As at present advised I must hold that if the leave stands the amendments must go ; if the amendments stand leave must go. As to whether the suit is good or not apart from leave, there must be a preliminary issue.

I want to hear you on the question whether such a material part of cause of action arose here as to make it right to grant leave to sue here.]

Raikes.—There is no dispute as to facts. As to the agreements I admit that the Khataos signed the agreement in Bombay. As to Visram Ibrahim & Co. there is no evidence to show where they signed the agreement. We do not know, and their affidavit on the point saying that they signed in Bombay is merely on information and belief without stating source of information, which of course is no evidence.

There is no allegation that as to Mr. Macleod the cause of action arose in Bombay. He steps in the shoes of Visram Ibrahim & Co. and it is not alleged in the plaint that Visram Ibrahim & Co. signed in Bombay.

[TYABJI, J.—Can you split up the agreement in this manner into two portions—one affecting the Khataos and the other Visram Ibrahim & Co.? Is it not one whole agreement ?]

Raikes.—I submit that it can be so split up. Their cause of action is briefly this : “Defendants promised to pay off the debentures on a certain date. The date has arrived and we ask them to pay off. They refuse.” Now I say no part of this cause of action arose in Bombay. [Reads agreement.] They have to prove that this agreement was signed and delivered by Shaw Wallace & Co. and nothing more.

(1) (1889) 13 Bom. 404.

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[TYABJI, J.—There cannot be contract except by both sides agreeing. They must prove their own signatures.]

Raikes.—Take a promissory note. It is a contract, but signed by only one party. This is a promissory note, only a complicated one. They need not in this case prove that Gordhandas and Mulraj signed the agreement at all. Supposing by some oversight they forgot to prove their signing it, could it be possible to take that point before a Court of Appeal that they had not proved their own signatures? Is their signing it a “material part of the cause of action”? Suppose in this case this contract, when produced, turned out to be signed only by Shaw Wallace & Co., and Shaw Wallace & Co. took the point that this was signed only by themselves and not by plaintiffs.

[TYABJI, J.—The assent of both sides to the contract is required—of course there may be documents which would show on the face of them the assent of one of the parties—of the plaintiffs.]

Raikes.—Yes, here the filing of the suit by plaintiffs sufficiently shows their assent. Supposing there were a lease signed only by the lessor, that would be enough for the lessee to sue upon.

[TYABJI, J.—Would that not depend upon the covenants? If there are covenants by the lessee, would not his assent have to be proved?]

Raikes.—Supposing the allegations in the plaint were denied only in this one respect, *viz.* that plaintiff signed this agreement, would that be enough to prevent plaintiff's suits?

[TYABJI, J.—No; they would have to allege that there was no agreement,—that the plaintiffs did not assent to the proposal—and the defendants would use the fact that the plaintiffs did not sign the document as evidence of absence of assent on the part of the plaintiffs.]

Raikes.—As to the balance of convenience that is immeasurably in favour of the suit being tried at Calcutta, see *Hadjee*

Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub ⁽¹⁾, which is one of the very few cases that considers when leave should be granted,—in other words in what cases the discretion should be exercised. There they held that the whole cause of action did not arise in Calcutta. It was not suggested that a material part did not arise in Calcutta. They simply held that as the balance of convenience was for trial at Bombay, leave should not be given for trial in Calcutta. There they said that the only difficulty against plaintiff was that, if they sued in Bombay, they would have to give security. The defendants then undertook not to ask for security, and on that the leave was rescinded.

Now, here the only inconvenience to plaintiffs might be that they should have to go to Calcutta to give evidence. We are willing that they should be examined in Bombay.

Davar.—The case of *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* ⁽¹⁾ is not of the slightest help. The clause of the Letters Patent which is discussed here does not come into prominence there at all: *Dobson and Barlow v. The Bengal Spinning and Weaving Co.* ⁽²⁾; *Rivett-Carnac v. Goculdas Sobhanmull* ⁽³⁾; *Ram Ravji Jambhekar v. Pralhaddas Subkarn* ⁽⁴⁾; *Rampartab Samrathrai v. Foolibai* ⁽⁵⁾.

Raikes.—The decision in *Dobson v. The Bengal Spinning and Weaving Co.* ⁽²⁾ was confirmed on appeal. There was no argument there at all that there was any hardship on the defendants. The judgment of Fulton, J., was never approved by the Court of Appeal.

TYABJI, J.—This is a summons calling upon the plaintiffs to show cause why the leave granted by me on the 21st of November 1904 under clause 12 of the Letters Patent should not be rescinded and why the plaint should not be taken off the file and returned to the plaintiffs and why the plaintiffs should

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(1) (1874) 13 Beng. L. R. 91.

(3) (1895) 20 Bom. 15.

(2) (1896) 21 Bom. 126.

(4) (1895) 20 Bom. 133.

(5) (1896) 20 Bom. 767.

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not be ordered to pay the defendants' costs of the suit and of and incidental to this summons, and in the alternative it prays for certain other relief.

I need not go into the alternative case till I have decided the first question as to whether the leave granted by me should be rescinded or not.

Now, a good deal of time has been taken up in discussing the question as to what constitutes "cause of action" or "material cause of action" and as to the circumstances under which leave should or should not be granted. But it seems to me that these points have been discussed and decided *ad nauseam* in the various cases cited before me and which leave no ground for any doubt as to what constituted "cause of action." So far as I am concerned, the point came before me several times within a very short period of time and I have now no doubt as to the true meaning of "cause of action". It means "that bundle of facts which it is essential for the plaintiff to prove before he can succeed in a suit," or, as Mr. Justice Fry puts it in one of the cases cited, "that bundle of necessary facts in the absence of which the plaintiffs must necessarily fail." The one is putting it in the affirmative form and the other in the negative. But in every case "cause of action" means and includes everything without which the plaintiff must necessarily fail.

Now, let us apply this principle to the case before me. The case of the plaintiffs is based upon two agreements dated, respectively, the 22nd of August 1898 and the 13th of September 1898. In order to entitle the plaintiffs to succeed they must prove the agreements between themselves and the defendants. They must prove either the performance or readiness to perform on their part. They must prove the breach of contract on the part of the defendants and they must prove the consequences and the damages resulting from the non-performance by the defendants. These, therefore, are the four necessary ingredients for the plaintiffs to prove. Every one of them is an essential part of the "cause of action."

Now, in order to prove the two agreements it is necessary for the plaintiffs to establish that they themselves were not

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merely parties to the agreement but that they assented to the provisions of the agreements. When I look at the form of the agreements I see they are framed in such a way as to necessitate or require the execution of these agreements by the plaintiffs. As a matter of fact they have been executed by the two plaintiffs and I think that, without proving their signatures on these documents, there would be a great difficulty for the plaintiffs to succeed in the suit. The existence of the contract depends upon the assent of the plaintiffs, and it is admitted that two of the plaintiffs at least have executed the contract in Bombay. It is also alleged that Visram Ebrahim & Co. also executed them in Bombay, but that is a point upon which there is a dispute. Taking it as an admitted fact that these two agreements were executed in Bombay by the two plaintiffs, I am unable to entertain even a doubt that a very material part of the cause of action accrued in Bombay—in fact, a part without which the plaintiffs must necessarily have failed. Therefore that being my opinion, it follows that under clause 12 of the Letters Patent it is within the power of this Court to grant permission if it considered it fit under the circumstances of the case to grant such permission. The existence of a part of the cause of action within the jurisdiction is absolutely necessary for a Court to give permission. That is the foundation of the jurisdiction; without this, no matter how convenient it may be to try the suit here, the Court has no power. The mere fact that a material part of the cause of action has accrued within the jurisdiction, although it gives the Court the power to grant leave, does not make it incumbent upon the Court to grant it.

The second branch of the question resolves itself into the discretion of the Court, that is the discretion which is to be exercised not arbitrarily but judicially, taking into consideration all the circumstances of the case and looking at the case not merely from the point of view of the convenience of the plaintiffs but also taking into consideration the convenience or otherwise of the defendants. In other words, the question which a Court sets itself to ask is "I have the power to permit the plaintiff if I like to sue in this Court but would that be the right procedure? Should I be inflicting such a hardship upon the defendants by giving permission to

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the plaintiffs as to make it improper for me to exercise that jurisdiction in favour of the plaintiffs?" That is the point of view from which I must consider the question as to whether the discretion which I exercised at the time of granting the leave was properly exercised or whether circumstances have been brought to my notice now which ought to make me think that it was not properly exercised and which ought to make me withdraw the permission which I originally granted.

Now what are the facts? The contract which is the basis of the plaintiffs' suit was partly executed in Bombay and partly in Calcutta. All the prior negotiations apparently took place in Calcutta. Subsequent payment of the interest, the tender of the shares and the breach of the contract, if any, all took place in Calcutta. In fact I may say that beyond the execution of the documents by the two plaintiffs the rest of the transactions which are involved in this suit all took place in Calcutta. It follows from this that although in my opinion a very essential part of the cause of action accrued within the jurisdiction yet the other portions of the cause of action, that is, the performance or non-performance, the breach, the damages and the consequences arising from the non-performance, accrued in Calcutta. Therefore the greater part of the cause of action accrued in Calcutta.

Then as regards the parties all the plaintiffs live in Bombay. They carry on their business in Bombay. Out of the five defendants four carry on business in Bombay though they do not live in Bombay. One of the defendants, namely, the fifth defendant, who is the executor of one of the deceased defendants, lives neither in Bombay nor in Calcutta but lives in England. I have been told by Mr. Davar, the plaintiffs' Counsel, that it is the intention of the plaintiffs not to continue the suit as regards the fifth defendant but to prosecute it in regard to the first four defendants only. Now seeing that the first four defendants actually carry on business in Bombay and that that fact *per se* gives jurisdiction to the Court without going into the question of the cause of action and that there is no need to obtain leave of the Court in regard to them it does seem to me rather extraordinary that the plaintiffs should still insist upon leave being granted, and Mr. Davar has failed to make it clear to me why the leave is

necessary otherwise than perhaps as a matter of precaution. However the fact remains that all the plaintiffs live in Bombay and carry on business in Bombay and that all the four defendants against whom it is intended to prosecute this suit actually carry on business in Bombay although they do not live in Bombay.

Then, as regards the evidence, so far as the plaintiffs' case is concerned it rests on facts which are entirely admitted, that is to say, it rests on documents on which the suit is filed and it rests upon the construction of these documents read in the way in which they at present stand. It does not seem to me that so far as the plaintiffs are concerned they require any further evidence in Bombay or in Calcutta beyond the fact of proving the tender of the shares. But the evidence (a greater portion of it, I should say) on the part of the defendants undoubtedly is entirely in Calcutta. If any witnesses have to be examined they will be from Calcutta. But it seems to me that a greater portion of the evidence of the defendants themselves would rest upon documentary and not upon oral evidence so far as I can judge at present.

Balancing, therefore, the conveniences on the one hand and the inconveniences on the other and remembering that the leave has already been granted and considering the question whether it has been improperly granted and whether it should be rescinded I have now come to the conclusion that the case for rescission is not made out. I think the Court had power to grant the leave. An essential part of the cause of action accrued within the jurisdiction. And I think I am able to say after having weighed the *pros* and *cons* of this case that the permission was not improperly granted and that being so having exercised my discretion I am not satisfied that I was wrong in giving permission to the plaintiffs to sue.

Now having said that as regards the second portion of the summons I must hear the parties in so far as they desire to be heard further. I will hear them either in Chambers or in Court, but I am entirely in the hands of the Counsel in the case. If the matter rests on affidavits, I will hear them now on this summons otherwise I will hear the matter in Court. But I must again tell Mr. Davar that as at present advised I am inclined to

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think that the amendments were improperly introduced into the plaint and if after this intimation he chooses to run the risk it is his business and it is for him to say what course he will adopt.

[TYABJI, J.—I will again point out to Mr. Davar that I think the leave places his client in great difficulty as regards the amendments, and that he should consider whether he has to gain anything by proceeding under the leave. But if he insists on proceeding in the suit under the leave, then I will not rescind it.]

Raikes.—We would like to consider your Lordship's decision and would be thankful for an adjournment of a week.

[*PER CURIAM*.—I will in that case adjourn the summons for further argument to next Saturday, 22nd July 1905.]

The plaintiffs having elected to proceed under the leave the summons came on for further argument on July 22nd, 1905.

Davar for plaintiff:—The second part of the summons is why the suit should not be put down for the trial of a preliminary issue and why amendments should not be struck out.

As to the amendments the Prothonotary has power to make the order. See Rule 80 (a) of the Rules and Forms of the Bombay High Court. One of the sub-clauses of this rule refers to formal amendments. The amendment in this instance was formal and made before service of summons and it is absolutely unconnected with the cause of action. The addition consists of "*viz.*" and then five names follow. The suit originally was against not merely the firm, but the members of the firm. The amendment was purely a formality.

[TYABJI, J.—Supposing you had not amended then there would have been a suit against the firm.]

Davar.—Then possibly Rule 361 of Rules and Forms of the Bombay High Court would have given us trouble as the firm did not carry on business in Bombay. Accordingly we sued the "firm and the partners of the firm on 13th September 1898." Then later on we filled in the blanks, as regards the names of the partners. We took the precaution in the first instance of filing

the suit not only against the firm, but also in so many words against the partners of the firm. No doubt *Rampurtab Samruthroy v. Premsukh Chandamal*⁽¹⁾ lays down that the grant of leave under cl. 12 relates to the plaint as it stood when leave was granted. Our cause of action is not changed by the addition. We sued at the start the partners of the firm, and now we sue no one else. The only point made by Mr. Raikes is that we sued only the partners and not the representatives of the partners. I concede that, and consent to have the fifth defendant taken out. The question whether there is jurisdiction or not is for the plaintiff and not for the defendant. We do not want any preliminary issue.

Raikes for defendants :—Several questions arise in this case which are new. The question of substance that remains is—granting that a material part of the cause of action has arisen in Bombay, has the Prothonotary power to amend the plaint in the way it is amended. Now it is admitted that the firm did not carry on business in Bombay (see Rule 361 of the Rules and Forms of Bombay High Court). So the suit could not lie against the firm. But Mr. Davar relies on the remaining words in the title to the plaint. Suppose the words now added are struck out, then the title would be “against partners of a firm.” Would your Lordship accept such a plaint? Your Lordship would say “ascertain the names of the partners before presenting the plaint for acceptance.” Test the statement in this way. Suppose there is a suit for defamation filed against “the person who libelled the plaintiff in such and such a newspaper on such and such a date” filed the day before the term of limitation expired. Then subsequently if the name of the defendant were found out and sought to be put in, could that be done? The addition by the Prothonotary was not merely formal and not such as can be made under Rule 180 of the Rules and Forms of Bombay High Court.

I submit that until the amendment the suit was not properly constituted at all. Under the Civil Procedure Code every plaint must contain certain particulars, and unless it does contain them,

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it cannot be accepted. The plaint as filed gave no jurisdiction to the Court. The suit was originally only against the firm. The words "and the partners of the firm" is mere surplusage. What is the meaning of suing a firm but suing partners of the firm? See Rule 361 of Rules and Forms of the Bombay High Court. There is no suggestion in any of the rules that you can join and sue the same persons twice over. Of course there is this distinction that if you sue the firm your cause of action is joint; if you sue the partners individually, it is several. They could not have sued "the partners of the firm" severally at all without naming them. I submit it is a perfectly good suit against the firm, but not against the partners.

The Prothonotary could not add the fifth defendant at all. That is an addition of a party which can only be done by the Court. Again the amendment changed the cause of action from joint liability to separate liability. The fifth defendant represents a person that was dead at the time the cause of action arose. The addition of a party can be only made under s. 32 of the Civil Procedure Code.

Davar.—A reference to s. 43 of the Indian Contract Act will show that though we sued the firm we could execute the decree separately against each of the partners of the firm sued.

Raihes.—Rule 68 of the Rules and Forms of Bombay High Court shows how the decree against a firm can be executed.

The fifth defendant objects to be struck out. He is sued with his partners and he contends that the suit should be dismissed against all the partners or that his name should be kept on the record.

TYABJI, J.—This summons which was taken out on the 14th of April 1905 calls upon the plaintiffs to show cause against several things. The first is—"Why the leave granted, under clause 12 of the Letters Patent, on the 21st November 1904 to the plaintiffs to file this suit should not be rescinded." With that part of the summons I have already dealt and I held that no substantial ground to my satisfaction had been made out as to why the leave should be rescinded. The next thing is—"Why

the plaint in this suit should not be taken off the file and returned to the plaintiffs." This depends on the question as to whether the Court has any jurisdiction at all against the parties as appearing in the plaint and if the Court has jurisdiction of course the plaint cannot be taken off the file of the Court. The next is—"Why the plaintiffs should not be ordered to pay the defendants' costs of this suit and of and incidental to this summons and the order thereon." This is a different matter and depends on the result of the summons.

The next is—"Why the suit should not be set down on the board for the hearing of the following preliminary issues:— (1) Whether the Court has jurisdiction to try this suit. (2) Whether the leave granted under clause 12 of the Letters Patent should not be rescinded." This portion of the summons has been already dealt with and it has been found convenient for all parties that the matter should be dealt with by me in Chambers.

Then comes the important part—"or why in the alternative the Chamber order dated the 22nd December 1904 should not be set aside and the amendments in the plaint purporting to have been made in pursuance thereof should not be struck out and why the plaintiffs should not be ordered to pay the costs thereof and of and incidental to this summons." The order of the 22nd December 1904 which this summons asks to be set aside was an order made by the Prothonotary under the Rules of the High Court which authorise the Prothonotary to permit certain formal amendments to be made in the pleadings. The question therefore turns upon the point whether or not the amendments authorised by the Prothonotary by his order of the 22nd December 1904 were or not of a formal character. It is admitted that if they were of a formal character they would be within the authority of the Prothonotary. If they were not of a formal character but really affected the substantial portion of the suit itself, that is if they affected the cause of action or substantially affected the parties by adding new parties, or by substantially changing the liabilities of the parties, then I think it must equally follow that the amendments would not be of a formal character and could not be authorised by the Prothonotary inasmuch as the permis-

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sion to allow such amendments to be made necessarily involved the exercise of judicial functions.

That compels me to look carefully into the order actually made by the Prothonotary to see whether it was of a formal character or not. The order runs thus :—" Upon reading the affidavit of A. V. F. Monteiro sworn on the 21st day of December 1904 and the exhibits annexed thereto and upon hearing Messrs. Craigie, Lynch & Owen, attorneys for the above named plaintiffs : It is ordered that the plaintiffs' attorneys be at liberty to amend the title of the defendants to this suit by adding the names of the following persons as defendants thereto in the plaint and proceedings filed herein *viz.*" Then follow the names of five persons and then there is the consequential order to which it is not necessary for me to refer.

It will be observed that what the Prothonotary directed was that the plaintiffs' attorneys be at liberty to amend the title of the defendants to this suit by adding the names of certain individuals. Now the plaint as it originally stood as regards the defendants ran as follows :—" The firm or partnership of Shaw Wallace & Co. as it was constituted on the 13th September 1898 and the partners in the said firm on that date." And it stopped there. What has now been done under the order of the Prothonotary is that the names of five persons have been added, *viz.* of the four surviving partners and of the executor of a deceased partner. It is argued on behalf of the defendants that the addition of the names of these defendants materially alters the suit and that it adds new parties to the suit and that it changes the character and the liabilities of the defendants. Now, Mr. Raikes, Counsel for the defendants, argued that the plaint as it originally stood must be construed to have meant that only the firm was sued and not the individual partners ; in other words, that the words " and the partners in the said firm on that date " were a mere surplusage and must be taken to mean nothing at all. Now, considering that this plaint was drawn by Counsel of very great experience, Mr. Inverarity, as I see from his name on the plaint, I am loath to assume that he used these words without having in his mind some meaning which he intended to attach to these words and it seems to me after having considered care-

fully the point that I must give some meaning to these words, and the conclusion I have come to is that what Mr. Inverarity intended by the words he uses is to make two sets of defendants, that is to say, to sue the firm of Shaw Wallace & Co. as it stood on the 13th September 1898 in the *quasi* corporate capacity and secondly to sue the individual members of the firm as it was then constituted. But probably not being aware of the names of the partners of that time he was not able to insert the names. I have not seen the draft of the plaint but I should not be surprised if there was something in it which might indicate that the names were to be put in after they were discovered. However the plaint as it was drafted was submitted to me in Chambers on the 21st of November 1904 and on that day I granted leave to the plaintiffs under clause 12 of the Letters Patent to sue the defendants. As I said before the question of the rescission of the leave has been already disposed of and I may say here that I held that the leave was properly granted and should not be rescinded on two main grounds—(1) because a material part of the cause of action had accrued within the jurisdiction of this Court and (2) because it was admitted that four of the individual partners who have been made defendants were carrying on business within the jurisdiction at the time the suit was filed. The plaint having been accepted on the 21st November 1904 an order was made by the Prothonotary on the 22nd of December 1904 and the amendments were then inserted on the 7th of January 1905 as appears from the plaint itself. And it appears that the service of the summons upon some of the defendants was effected in Calcutta somewhere about the 17th of January 1905. The other defendants who were in England were no doubt served later. This summons was not taken out till the 14th of April 1905. The amendments were therefore made before the summons was served on the defendants.

Now as regards the question as to whether the Prothonotary should have made the order without giving notice to the defendants and without hearing them, it is to be observed, as I have just pointed out, that the summons had not been served on any of the defendants before he made the order. It was apparently a matter for the discretion of the Prothonotary or the Judge

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whoever was the authority whether the amendments should be allowed or not but no grievance can be made that the defendants were not consulted on the words because the suit as against them had not been launched to the extent of the service of the summons having been effected upon them.

Taking the view that I do of the real meaning of the title of the plaint before the amendment it of course follows that the plaint was defective in the sense that although the partners, *i. e.*, the individual partners, were intended to be sued yet their names and their descriptions and the places of their residence as required by section 50 of the Code of Civil Procedure had not been properly inserted. Section 50 of the Code requires that the plaint must contain *inter alia* the name, description and place of residence of the defendant so far as they can be ascertained. Well, I suppose the names of these defendants were not inserted in the plaint at the time because as is quite clear to me the plaintiffs were not aware of the names of the defendants. They only ascertained them later on and they put them on record. But undoubtedly under section 50 of the Code the plaint was defective in not giving the particulars required by that section. The question is—Was the filling in of the particulars required by section 50 an alteration of the suit to such an extent as to affect the merits of the case? If the leave under clause 12 of the Letters Patent had not been obtained, and if the suit had been filed as an ordinary suit without any leave, no question as to the propriety of the amendments could possibly have arisen. But the difficulties have arisen only by reason of the fact that the amendments were introduced into a plaint which had been accepted under clause 12 of the Letters Patent. For the decisions show that very careful consideration is required before any amendments can be permitted in a suit accepted under clause 12 of the Letters Patent, and if the amendments are material or go to alter in any way the character of the suit or the liabilities of the parties I think they would be open to very serious objection and may not be covered by the leave originally granted.

But after having given the best consideration to the case I am of opinion that the amendments introduced into the plaint here

were formal amendments, and what the Prothonotary ordered to be done was simply to fill in or to supply the blanks without which the suit was defective according to the real intention of the plaintiffs but which did not affect the liabilities of the defendants. Further, as at the time the defendants were served the amendments were already in the plaint I must say they have not been damnified by what has been done.

The result is that in my opinion the defendants have failed in making out that there is any ground either for setting this suit down on the board for hearing preliminary issue or taking the plaint off the file or for removing the amendments from the plaint. I therefore think the summons must be dismissed now in its entirety and the defendants must pay the costs.

Summons dismissed with costs.

Against this order the defendants preferred an appeal. The grounds of objection urged were, among others, the following :—

(1) The learned Judge erred in holding that the plaintiffs' cause of action had arisen in part within the local limits of the Original Civil Jurisdiction of the Bombay High Court; (2) he should have held that no part or at all events no material part of the cause of action had arisen within these limits; (3) even if a material part of the cause of action arose within the limits mentioned, yet the Judge in his discretion and having regard to the great inconvenience which it was shown would result to the defendants from this suit being tried in this Court ought to have refused leave to the plaintiffs to sue; (4) the learned Judge ought to have rescinded the leave granted by him under clause 12 of the Letters Patent; and (5) he erred in holding that the amendment of the plaint by the Prothonotary on the 22nd December 1904 was merely a formal amendment.

Raikes (with *Strangman*) for the appellants :—The Court had no power to grant leave under clause 12 of the Letters Patent, and, if it had, the power was not properly exercised by Mr. Justice Tyabji. The only fact alleged in the plaint as forming a part of the cause of action is the putting of the signatures to the agreement in Bombay, and that fact even is denied by us, so that at any rate your Lordships will direct that issue of fact to be tried as a preliminary issue. It is desirable

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that this suit may be brought in Calcutta, because all our witnesses and all our advisers are there. [*Lowndes* :—But ours are here.] Moreover, the suit could not have been entertained with or without leave on the plaint as originally presented in the name of the firm, because it offends against Rule 361. The suit was brought in the name of the firm, and subsequently it was amended by an *ex parte* Chamber order from the Prothonotary, the amendment being the addition of the names of the defendants constituting the firm. The fifth defendant, who is sued also in the firm name, was not a partner of the firm at the time of the accruing of the cause of action, and was not carrying on business within the jurisdiction either at the time of the cause of action or at the date of the suit.

Lowndes :—We have given notice that we shall not proceed against the fifth defendant and we are willing to pay his costs.

Raikes :—We do not wish him to be left out.

The 'defendant' in clause 12 means all the defendants and the plaintiffs cannot sue some defendants and leave out others: *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub*⁽¹⁾. We also contend that the Prothonotary had no power to amend the plaint as he did, and that the Court has no jurisdiction to determine the suit whether leave was granted or not. The leave of the Court must be obtained before the institution of the suit: *Shaikh Abdool Hamed v. Promothonauth Bose*⁽²⁾ and the plaint cannot be amended after the leave: *Rampurtab Samruthroy v. Premeek Chaudamal*⁽³⁾.

Lowndes for the respondents.

JENKINS, C. J. :—The principal question in this appeal is as to the power of the Court to receive this suit. The plaintiffs are Messrs. Gordhandas Khatao and Mulraj Khatao and Mr. N. C. Macleod the Official Assignee and Assignee of the estate and effects of certain traders, who until recently carried on business under the name and style of Vishram Ebrahim & Co.

(1) (1874) 13 Beng. L. R. 91.

(2) (1866) 1 Ind. Jur. (N. S.) 213.

(3) (1890) 15 Bom. 93.

The defendants are described in the heading to the plaint as "The firm or partnership of Shaw Wallace & Co. as it was constituted on the 13th September 1898 and the partners in the said firm on that date."

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According to the allegations in the plaint the first and second plaintiffs and Vishram Ebrahim & Co. on the 22nd August 1898 entered into an agreement with the defendants Shaw Wallace & Co., who committed a breach of the agreement entitling the plaintiffs to sue them in respect thereof. In the 16th para. of the plaint it is alleged, the defendants carry on business in Bombay. Part of the cause of action arose in Bombay.

The plaint was admitted on the 21st November 1904, the leave of the Court having first been obtained under clause 12 of the Letters Patent.

Prior to the service of summons and pursuant to a Chamber order of the 22nd December 1904 the plaint was on the 7th of January 1905 amended by the addition of the names of Messrs. Wallace, Ashton, Greenway, Hue and Meakin. The first four are described in the amendment as formerly carrying on business with Edmund von Schmidt Secherau (now deceased) under the style or firm of Shaw Wallace & Co. and Mr. Meakin is described as the executor of Mr. Secherau. It is common ground before us that the partners at that date were the first four of these persons and Mr. Secherau, who has since died leaving as his executor the defendant Mr. Meakin, and that at the institution of the suit the first four named together with another person were carrying on business as co-partners within the Original Jurisdiction of this Court under the name of Shaw Wallace & Co.

In these circumstances it is urged that leave should not have been granted under clause 12 of the Letters Patent, that the order allowing the amendment was wrong and that the Court had no jurisdiction to receive the suit.

The propriety of the leave need not be considered, if it was unnecessary, and, apart from it, the Court had jurisdiction to receive the suit.

Until the recent rules of this Court came into operation a plaintiff was not allowed to sue partners in their firm name on the Original Side of the Court.

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It is, however, now provided by Rule 361 that—

Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firm, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to a suit may in such case apply by summons to a Judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct.

But Messrs. Wallace, Ashton, Greenway and Hue are, according to the allegations in the plaint, liable as co-partners to the plaintiffs, and none the less would they be so because the estate of their deceased co-partner may also be liable together with them. It is also stated that they are carrying on business within the jurisdiction, and this would be so though there may be associated with them a partner who was not a member of the firm when Shaw Wallace & Co. entered into the agreement on which the suit is based. The case, therefore, in my opinion falls within Rule 361. This rule, however, does not extend the jurisdiction of the Court: it merely sanctions the use of the firm name as a convenient description of its several members and exempts a plaintiff from the obligation of setting forth their names at length.

For the purpose therefore of determining the Court's jurisdiction the suit must be treated as though the names of the partners had been set forth in the heading to the plaint.

Now, had Messrs. Wallace, Ashton, Greenway and Hue been actually named as defendants in the first instance, then as against them the plaint could have been admitted without leave under clause 12 of the Letters Patent, having regard to the first allegation in para. 16 of the plaint. And these four persons are the only members of the old firm who could be sued under the firm name, seeing that their other partner, Mr. Secherau, was dead and so was not carrying on business at the date of the suit. Therefore, the suit as originally framed was, in my opinion, rightly received, irrespective of leave under clause 12 of the Letters Patent, and the appellants' contention that the Court had no jurisdiction fails.

This brings me to the exception taken to the order of the 22nd December 1904. So far as it sanctioned the addition of Mr. Meakin's name it was, I think, beyond the powers of the Prothonotary. Mr. Meakin was not a party to the suit at its admission, and even if leave subsequent to the admission of a plaint can be given under clause 12 of the Letters Patent—as to which I say nothing—I am clearly of opinion that leave could not be given by the Prothonotary. Mr. Meakin, therefore, as the executor of Mr. Secherau has wrongly been added as a defendant. Mr. Davar at the close of the judgment under appeal stated that he was willing to have him dismissed from the suit, and a similar statement has been made before us. Mr. Meakin's name, therefore, must be struck out unless the defendants desire that it be retained. As to the other defendants the amendment was useless if they already were parties: if they were not, then the amendment should not have been made except by an order of a Judge, seeing that leave had been obtained under clause 12 of the Letters Patent.

The last part of the Rule 361 shows the proper procedure to be followed.

The order under appeal must therefore be varied by directing that the amendment consequent on the order of the 22nd December 1904 be struck out, but in other respects it will be confirmed. The plaintiffs' costs of this appeal must be borne by the first four defendants, but at the defendants' Counsel's request this will be without prejudice to any claim by those defendants to recover from the fifth defendant or the estate of Mr. Secherau. The plaintiffs undertake that they will not oppose any application made within two months of this date to add Mr. Meakin as a party. In case he is not added as a party to this suit the plaintiffs must pay his costs up to this date. If he is added then those costs will be reserved.

Order varied.

Attorneys for appellants: *Messrs. Little & Co.*

Attorneys for respondents: *Messrs. Craigie, Lynch & Owen.*

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CRIMINAL REFERENCE.

Before Mr. Justice Russell and Mr. Justice Aston.

EMPEROR v. DWARKADAS DHARAMSEY.*

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January 17.

City of Bombay Municipal Act (Bom. Act III of 1888), section 249†—Place of public resort—Theatre.

A theatre is a place of public resort and as such falls within the purview of section 249 of the City of Bombay Municipal Act (Bom. Act III of 1888).

THIS case came before the High Court on a reference made by Karsondas Chhabildas, Esquire, Acting Second Presidency Magistrate, which runs as follows :—

"I have the honour to refer under section 432. Criminal Procedure Code, the following question of law which has arisen in the hearing of a complaint by the Municipal Commissioner for the City of Bombay against defendant Dwarkadas Dharamsey of an offence punishable under section 471 of the Bombay Municipal Act III of 1888, in failing to comply with the requisition of Notice No. 4 of 1905 issued under section 249 of the Bombay Municipal Act III of 1888. The question of law is whether a theatre falls within the purview of section 249 of the Municipal Act, which runs as follows" :—

[The learned Magistrate here set out the section and continued :—]

"The defendant Dwarkadas Dharamsey is called upon as owner of the Elphinstone theatre to provide privy accommodation on the said theatre and it is urged on his behalf that under section 249 of the Municipal Act, the Municipal Commissioner is not empowered to call upon the owner or occupier of a theatre to provide privy accommodation and that the issue of such a notice is illegal. It is further urged that the definition of 'other place of public resort' in the said section must be construed *ejusdem generis* with the words preceding. Counsel for the defendant has also quote : Maxwell on the Interpretation of Statutes, page 461, 3rd edition which says when two or more words susceptible of analogous meaning are coupled together, *noscuntur a sociis*, they are understood to be used in their cognate sense. They take as it were their

* Criminal Reference No. 82 of 1905.

† Section 249 of Bombay Act III of 1888 runs as follows :

"Where it appears to the Commissioner that any premises are, or are intended to be used, as a market, railway station, dock, wharf or other place of public resort, or as a place in which persons exceeding twenty in number are employed in any manufacture, trade or business or as workmen or labourers, the Commissioner may, by written notice, require the owner or occupier of the said premises to construct a sufficient number of water-closets or latrines or privies and urinals for the separate use of each sex."

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colour from each other; that is, the more general is restricted to a sense analogous to the less general. The Honourable Mr. Crawford on behalf of the Municipality has on the other hand drawn the attention of the Court to page 475 of the same book which says: 'Of course the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it was not used in the limited order of ideas to which its predecessors belong. If it can be seen from a wider inspection of the scope of the legislature that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the legislature as gathered from the larger survey.' Under these circumstances the question for consideration is whether 'other places of public resort' should be construed as meaning a place of public resort of any kind or a place of the same kind, as a market, railway station, dock or wharf. In my opinion the words 'other place of public resort' must be construed generally, *i. e.*, as meaning a place of public resort of any kind and not as *ejusdem generis* with the words market, railway station, dock or wharf. In the first place, the words market, railway station, dock or wharf are not *ejusdem generis* and I fail to conceive any place analogous to market, railway station, dock or wharf. In my opinion, therefore, the principles laid down by Maxwell on Interpretation of Statutes on page 461, *viz.*, when two or more words susceptible of analogous meaning are coupled together *noscuntur a sociis* they are understood to be used in their cognate sense, do not apply in this case. If 'other place of public resort' in section 249 is to be construed as a place of public resort *ejusdem generis* with market, railway station, dock or wharf, then those words should be rejected altogether as it is difficult to suggest any places of public resort analogous to market, railway station, dock or wharf. The words 'other place of public resort' being present in that section, the legislature must have intended to have some meaning attached to them. The only reasonable construction that could be placed on those words after taking into consideration the intention of the legislature is that 'other place of public resort' means other place of public resort of any kind. A theatre being a place of public resort falls in my opinion within the provisions of section 249 of the Municipal Act."

The reference was heard by a Bench composed of Russell and Aston, JJ.

Weldon for the Municipality.

H. C. Coyaji for Dwarkadas :—The expression "other place of public resort" in section 249 of the City of Bombay Municipal Act (Bom. Act III of 1888) does not include a theatre. This is apparent from the wording of the section itself. The places specified therein are (1) market; (2) railway station; (3) dock; (4) wharf; (5) a place in which persons exceeding twenty in number are employed in any manufacture, trade or business or

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as workmen or labourers. These are all places where we expect to find tradesmen or labourers or workmen at work for the greater part of the day, and where, therefore, the necessity contemplated by the section is most likely to arise. We do not find in the section any mention of a place where people meet for two or three hours amusement or entertainment, *e g.*, a music hall or a theatre. This contention is borne out by the marginal note to the section, which mentions "factories, &c."; and we are entitled to have recourse to it, since 'the headings prefixed to sections or set of sections in some modern statutes are regarded as preambles to those sections.' (Maxwell on the Interpretation of Statutes, 2nd edition, page 65.) The word "theatre" is not used in the section. The omission is significant and shows it must have been a designed omission. See also *Regina v. Cleworth*⁽¹⁾.

RUSSELL, J.—In this case the point raised is whether a theatre comes within section 249, Bombay Municipal Act (Bom. Act III of 1888), as premises used or intended to be used as a market, railway station, dock, wharf or other place of public resort or as a place in which persons exceeding twenty in number are employed, etc. The section gives, in such cases, power to the Municipal Commissioner to require the construction of a sufficient number of latrines or water closets or privies and urinals for the separate use of each sex.

Now the construction of the words "place of public resort" or "public place" where they occur in an Act of Parliament must depend on the context and scope and object of the Statute. (*Vide* Encyclopædia of English Law, Vol. 10, p. 97, title "place.")

What is then the scope and object of section 249? It is to provide proper and decent accommodation for persons of both sexes in the way of latrines, urinals, &c., in regard to the places specified in the section. It is, we think, clear that the words "other places of public resort" cover the case of a theatre which is *ejusdem generis* with a railway station; it is impossible to say, and it has not been argued, that the public do not resort to the theatre. Why then should not persons resorting to the theatre be provided with the same accommodation as persons

(1) (1864) 4 B. & S. 927.

resorting to a railway station. No evidence as to the number of persons employed at the theatre was given, so no point arises as to the second branch of the section.

For these reasons we answer the question sent to us in the "affirmative"

With regard to *Regina v. Cleworth*⁽¹⁾ relied on by Mr. Coyaji, the object of that Statute was to prevent certain classes of workmen from working on Sunday.

ASTON, J.—I concur that the answer must be in the affirmative. The places of public resort specified in the sentence preceding the words "or other place of public resort" do not differ *inter se* less than a theatre differs from them. There is nothing therefore in the "*ejusdem generis*" argument. It is therefore unnecessary for the purpose of answering this reference to ascertain whether the theatre in question comes under any other category in section 249.

Attorneys for the Municipality:—*Messrs. Crawford, Brown and Co.*

R. R.

(1) (1864) 4 B. & S. 927.

APPELLATE CIVIL.

Before Mr. Justice Aston and Mr. Justice Scott.

APPEAL No. 735 of 1904.

MINALAL SHADIRAM BY HIS MUKHTYAR RAMLOTANSING
BUDHANSING (ORIGINAL PLAINTIFF), APPELLANT, *v.* KHARSETJI
JIVAJI (ORIGINAL DEFENDANT), RESPONDENT.

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APPEAL No. 771 of 1904.

KHARSETJI JIVAJI (ORIGINAL DEFENDANT), APPELLANT, *v.* MINALAL
SHADIRAM BY HIS MUKHTYAR RAMLOTANSING BUDHANSING
(ORIGINAL PLAINTIFF), RESPONDENT.*

Res judicata—Civil Procedure Code (Act XIV of 1882), section 13—Consent-decree—Fraud—Defence—Limitation.

On the 4th June 1893, the defendant signed an acknowledgment (Ruzu) for Rs. 11,534-15-0 in favour of the shop of Bakhatram Nanuram, represented in the suit by the plaintiff.

* Cross-Appeals Nos. 735 of 1904 and 771 of 1904.

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On the 19th June 1894, the defendant paid Rs. 400 cash, and a Hundi for Rs. 600, and for the balance Rs. 10,534-15-0 he passed an instalment-bond payable by yearly instalments of Rs. 1,000 with interest at 6 per cent. on overdue instalment.

The *Hundi* for Rs. 600 was dishonoured in 1895 and the firm sued the defendant for its amount plus Rs. 45 interest in Suit No. 249 of 1895. The defendant pleaded want of consideration for the Hundi and further said that the acknowledgment had been passed in ignorance of the true state of accounts and because the facts had been concealed and misrepresented. A Commissioner was appointed to examine the plaintiff's accounts. He reported that the debt really due on the 4th June 1893 was Rs. 3,016-3-0 and not Rs. 11,534-15-0 as stated in the Ruzu. Upon this the claim in the suit was decreed without an adjudication of other questions raised by the defendant.

In 1897, the firm sued the defendant for the first and second instalments which had become due under the instalment-bond. This was Suit No. 105 of 1897 and was for Rs. 2,000 and interest. The defendant admitted the claim, which was decreed accordingly by consent.

In 1898, the defendant instituted Suit No. 412 of 1898 against the Bakhatram firm for cancellation of the instalment-bond, alleging that it was obtained by misrepresentation and fraud, and was void in law having been passed in respect of wagering transactions and that nothing was due under it. The final decision in the case was passed by the High Court, who, without giving any decision on the merits, dismissed the suit as time-barred.

Pending the above proceedings, the plaintiff filed this suit in 1902 against the defendant on the instalment-bond to recover the 3rd, 4th and 5th instalments amounting in all to Rs. 3,000 and interest. The defendant pleaded *inter alia* that the instalment-bond and prior Ruzu were obtained from him by fraud and misrepresentation and that the debt due was one arising from wagering contracts unenforceable by law. No findings were recorded on these points, as the Subordinate Judge held that the defendant was precluded by the decrees in suits No. 249 of 1895 and 105 of 1897 from raising any of his contentions. The claim was decreed with costs. On appeal, the District Judge also came to the conclusion that the bar of *res judicata* operated against the defendant, but held that the claim as to the 3rd and 4th instalments was barred by limitation.

Both the parties preferred appeals to the High Court.

Held by ASTON, J.—(1) that unless it be established that the pleas which the defendant had raised in the present suit and had not been allowed to prove, would, if proved in the Hundi Suit No. 249 of 1895, have reduced the amount actually due by him in June 1893 to less than Rs. 600, plus the Rs. 400 paid in cash, the decision in the Hundi suit could not operate as *res judicata* in respect of the said pleas, for the matter which might and ought to be made a ground of defence in the Hundi suit must be a ground of defence to “the claim actually made” in the said former suit.

(2) that the plea that the consideration for the instalment-bond partly failed because of the reasons set up in the pleas aforesaid, would have been irrelevant in the later suit No. 195 of 1897 for the first two instalments of Rs. 1,000 due under that bond, unless by setting up these pleas and proving them the claim in that later suit for Rs. 2,000 the amount of the first two instalments would have been reduced.

Held by SCOTT, J.—(1) that before the present suit was brought the issue as to consideration had not been raised except with reference to the Hundi and had been heard and determined in Suit No. 249 of 1895 with reference to that document alone. The defendant was, therefore, not barred by *res judicata* from pleading in this suit that the bond was no longer supported by consideration.

(2) that the lower Court was wrong in holding that the defendant was barred by section 13 of the Civil Procedure Code (Act XIV of 1882) from raising the questions of fraud or waiver as vitiating the bond as a security for the payment of the remaining instalments. The issue in Suit No. 249 of 1895 was a sufficient issue for the disposal of the case on the Hundi and in that suit the defendant's liability under the Hundi was the only matter in issue. In Suit No. 105 of 1897 there was no hearing and disposal of any matter in issue and the provisions of section 13 had, therefore, no application. Regard must be had to the reason and scope of the consent decree.

A defendant is entitled to resist a claim made against him by pleading fraud, and he is entitled to urge that plea though he may have himself brought an unsuccessful suit to set aside the transaction, and is not under certain circumstances like those in hand precluded from urging that plea by lapse of time.

Rangnath v. Govind⁽¹⁾ followed.

Mahomed v. Ezekiel⁽²⁾ not followed.

SECOND appeal from the decision of E. M. Pratt, District Judge of Khándesh, varying the decree passed by B. S. Joshi, First Class Subordinate Judge at Dhulia.

Suit to recover a sum of money.

There were dealings between the firm of Bakhatram Nanuram, represented in this suit by the plaintiff, and Kharsetjee the defendant. These resulted in the latter signing an acknowledgment (Ruzu) for Rs. 11,534-8-0 on the 4th June 1893.

On the 19th June 1894, the defendant gave to the plaintiff Rs. 400 in cash, a Hundi for Rs. 600 and for the balance of Rs. 10,534-15-0 an instalment-bond payable by yearly instalments of Rs. 1,000.

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(1) (1904) 28 Bom. 639 : 6 Bom. L. R. 592.

(2) (1905) 7 Bom. L. R. 772.

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The Hundi was dishonoured. The plaintiff thereupon filed Suit No. 249 of 1895 to recover Rs. 600 and interest. The contentions of the defendant were that there was no consideration for the Hundi, and that the plaintiff had shown him false accounts. The only issue raised in the suit was: "Is the Hundi sued on without consideration." The Court appointed a Commissioner to examine the accounts of plaintiff. He reported that the debt really due was only Rs. 3,016-3-0. The Court awarded the plaintiff's claim on the ground that the Hundi debt was within the total amount of the debt found due by the Commissioner.

The plaintiff then filed Suit No. 105 of 1897 to recover the first two instalments under the bond dated the 19th June 1894. The defendant allowed the decree to go by consent.

In 1898, the defendant filed Suit No. 412 of 1898 for cancellation of the instalment-bond on the grounds that it was fraudulent and that it was void in law, as it had been passed in respect of wagering transactions and that nothing was due on it. The suit was ultimately decided by the High Court who, without expressing any opinion as to its merits, dismissed it on the ground of limitation.

While these proceedings were going on, the plaintiff filed the present suit to recover the 3rd, 4th and 5th instalments that had accrued due. The defendant made the same averments as to fraud and wager and pleaded that two of the instalments were time-barred.

The issues raised in the Court of first instance were:

1. Whether the defendant is estopped from raising any contentions against the bond sued on?
2. Whether this suit is barred by section 13 of the Civil Procedure Code?
3. Whether the suit is not barred by limitation?
4. Whether the bond and the prior Ruzu are proved to have been obtained by fraud and misrepresentation?
5. Whether the debt was due on wagering contracts and therefore unenforceable by law?
6. Whether the defendant can claim to re-open the account and, if so, whether any and what balance turns up due by defendant to plaintiff on taking an account afresh?
7. Whether plaintiff was entitled to recover the amount claimed or any part thereof?

The Subordinate Judge took up the first three issues for decision in the first instance as involving preliminary points. He found the first in the affirmative, the second in the negative, and on the third his finding was "suit is not barred by limitation."

The defendant appealed against this decision. The District Judge held that the defendant was barred by *res judicata* from pleading that the bond was voidable for fraud and from pleading that the bond was void as the consideration was a wagering debt; and that the claim as to the 2nd and 3rd instalments was not in time.

From this decision, both the parties appealed to the High Court.

G. S. Rao for the defendant:—We say that the bar of *res judicata* does not come in our way. In the first suit (No. 249 of 1896) on the Hundi we impugned the plaintiff's accounts, which led the Court to appoint a Commissioner to examine the accounts. He found that all that was due by the defendant was Rs. 3,016-3-0. That suit ended in plaintiff's favour and when Suit No. 105 of 1897 was brought, we allowed the claim to be decreed by consent, as its amount fell within the figure found by the Commissioner to be due from us. We contend, under these circumstances, that neither the adjudication of the Hundi suit nor the consent decree operates as *res judicata*.

The law of limitation does not prevent a defendant from resisting a claim on the ground of fraud: *Rangnath v. Govind*⁽¹⁾; *Orr v. Sundra Pandia*⁽²⁾; *Krishna Menon v. Kesavan*⁽³⁾; *Hargovandas Lakhmidas v. Bajibhai Jijibhai*⁽⁴⁾.

Settlur (with him *N. F. Gokhale*), for the plaintiff:—The case is properly decided as barred by *res judicata*. In the Hundi suit the defendant put forward the very pleas that he is now urging, and the suit was decided in our favour. So also, in a subsequent suit No. 105 of 1897, the defendant did not raise any of the present pleas and allowed a consent-decree to be passed against him. It is held that a consent-decree operates as

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(1) (1904) 28 Bom. 639; 6 Bom. L. R. 592.

(3) (1897) 20 Mad. 305.

(2) (1893) 17 Mad. 255.

(4) (1889) 14 Bom. 222.

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res judicata: see *In re South American and Mexican Co.*⁽¹⁾; *Nicholas v. Asphar*⁽²⁾; *Laksmishankar v. Vishnuram*⁽³⁾.

The defendant is barred also by limitation from raising any of his pleas: *Mahomed v. Ezekiel*⁽⁴⁾.

ASTON, J.:—On 4th June 1893 Kharsetji Jiwaji (defendant) signed a Ruzu acknowledging Rs. 11,534-15-0 to be due by him to the shop of Bakhatram Nanuram of which Minalal Shadiram (plaintiff) is the present owner.

On the 19th June 1894 Kharsetji paid Rs. 400 cash, and a Hundi for Rs. 600, and for the balance Rs. 10,534-15-0 an instalment-bond payable by yearly instalments of Rs. 1,000 with interest at 6 per cent. on overdue instalments.

The Hundi was dishonoured in 1895 and the firm sued Kharsetji for Rs. 600 plus Rs. 45 interest in Suit No. 249 of 1895. The latter pleaded want of consideration for the Hundi and further said that the Ruzu aforesaid had been passed in ignorance of the true state of the accounts and because the facts had been concealed and misrepresented. A Commissioner appointed in Suit No. 249 of 1895 reported on examination of the shop accounts that the debt really due on 4th June 1893 was Rs. 3,016-3-0 and not Rs. 11,534-15-0 as stated in the Ruzu, in other words, that there was full consideration for the Hundi. The claim in Suit No. 249 of 1895 was accordingly decreed, the defendant's plea of want of consideration for the Hundi having failed.

In 1897 in Suit No. 105 of 1897 the firm sued Kharsetji for the first and second instalments which had become due under the terms of the instalment-bond aforesaid, that is to say, for Rs. 2,000 for both instalments and interest.

According to the report of the Commissioner in the Hundi Suit No. 249 of 1895 the debt actually due by Kharsetji on June 1893 covered the Rs. 400 paid in cash, and the Rs. 600 for which he gave a Hundi, and the amount of the first two instalments of the instalment-bond, total Rs. 3,000, the true debt according to the Commissioner being Rs. 3,016-3-0 in June 1893, and Kharsetji's pleader in the Suit No. 105 of 1897 admitted the

(1) [1895] 1 Ch. 37.

(2) [1896] 24 Cal. 213.

(3) (1899) 24 Bom. 77: 1 Bom. L. R. 534.

(4) (1905) 7 Bom. L. R. 772.

claim for the amount of the first two instalments and interest. The claim was decreed accordingly by consent.

Then Kharsetji who had never after the attitude taken up by him in the Hundi Suit No. 249 of 1895 admitted that more than Rs. 3,000 were due by him to the shop in June 1893, instituted against the Bakhatram firm Suit No. 412 of 1898 for cancellation of the instalment-bond, alleging that it was obtained by misrepresentation and fraud, and was void in law and passed in respect of wagering transactions and nothing was due under it.

The final decision in that case was passed by the High Court and is reported at p. 562 of I. L. R. 27 Bom., *Baktaram v. Kharsetji*. The High Court without giving any decision on the merits dismissed Kharsetji's suit for cancellation of the said instrument as time-barred.

Pending that appeal, Minalal, present owner of the Bakhatram shop, having attained majority, filed the present suit No. 138 of 1902 on the same instalment-bond to recover from Kharsetji the 3rd, 4th and 5th instalments Rs. 3,000 and Rs. 705 interest.

Kharsetji pleaded, *inter alia*, that the instalment-bond and prior Ruzu were obtained from him by fraud and misrepresentation and that the debt due was one arising from wagering contracts unenforceable by law and issues 4 and 5 framed by the Court of first instance covered these pleas.

No findings were recorded on these points, because the First Class Subordinate Judge held that Kharsetji was precluded by the decrees in the two prior suits Nos. 249 of 1895 and 105 of 1897 from raising any of these contentions now.

A plea that the claim as to the 3rd and 4th instalments was barred by limitation was decided against Kharsetji (defendant), because the Subordinate Judge held it proved by a judgment of the Punjab Chief Court that plaintiff Minalal attained majority on 28th March 1899. The claim was decreed with costs.

In appeal the District Judge decided that the claim as to the 3rd and 4th instalments was barred by limitation; his view being that the judgment of the Punjab Chief Court not being one *inter partes* is inadmissible in evidence and, therefore, it is not proved that plaintiff Minalal was a minor till 28th March

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1899, and further the instalment-bond was executed to the firm or shop of Bakhatram Nanuram which was under no disability to sue during the minority of Minalal.

The District Judge however held that Kharsetji is barred by *res judicata* from pleading that the bond is voidable for fraud or from pleading that the bond is void by reason of its consideration being a wagering debt.

The decree of the first Court was varied by allowing only the plaintiff's claim for the 3rd instalment Rs. 1,000, with interest at 6 per cent. to date of suit, the plaintiff being granted $\frac{1}{3}$ rd of his costs in both Courts.

Against this decree both parties have again appealed to this Court and the points argued at the hearing were, in Appeal No. 771, whether it was wrongly decided that Kharsetji (defendant) is precluded by a bar of *res judicata* from pleading in this suit that the plaintiff cannot recover under the instalment-bond in suit more than the first two instalments Rs. 2,000 already decreed in Suit No. 105 of 1897, because as to such excess there is a want of consideration for the reasons set up in the 1st and 2nd issues framed by the lower appellate Court: and in Cross Appeal No. 735, whether it was wrongly decided that the claim as to the 3rd and 4th instalments is time-barred.

Now, it has already been pointed out that the claim actually made in the Hundi Suit No. 249 of 1895 was for Rs. 600 and interest, and unless it be established that the pleas which Kharsetji has raised in the present suit and has not been allowed to prove, would, if proved in the Hundi Suit No. 249 of 1895, have reduced the amount actually due by him in June 1893 to less than Rs. 600, plus the Rs. 400 paid in cash, the decision in the Hundi suit cannot operate as *res judicata* in respect of the said pleas, for the matter which might and ought to be made a ground of defence in the Hundi suit must be a ground of defence to "the claim actually made" in the said former suit: see *Ramaswami Ayyar v. Vythinatha Ayyar*⁽¹⁾. This, however, has not been shewn.

Again, a plea that the consideration for the instalment-bond partly failed because of the reasons set up in the pleas aforesaid,

(1) (1903) 26 Mad. 760 at p. 767.

would have been irrelevant in the later suit No. 195 of 1897 for the first two instalments Rs. 2,000 due under that bond, unless by setting up these pleas and proving them the claim in that later suit for Rs. 2,000 for the first two instalments would have been reduced. This, however, does not appear to be the case. All that appears is that in Suit No. 249 of 1895 the Commissioner appointed to examine the shop accounts reported that the sum actually due by Kharsetji, when he signed the Ruzu for Rs. 11,534-15-0, was Rs. 3,016-3-0, and the conduct of Kharsetji in submitting to a decree for the claim actually made in Suit No. 195 of 1897 was in no way inconsistent with the attitude now taken up by him as to the further claim made in the present suit for other instalment.

In *In re South American and Mexican Co. Ex parte Bank of England*⁽¹⁾ Lord Herschell, L. C., remarked as to a judgment by consent: "I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such a judgment, and were to allow questions that were really involved in the action to be fought over again in a subsequent action." But the question whether the consideration for the instalment-bond so far failed as to enable Kharsetji to dispute successfully any claim for the subsequent instalments was a question not really involved in the second suit No. 195 of 1897 in which by consent the claim for the first two instalments Rs. 2,000 and interest was decreed.

Mr. Setlur for the plaintiff Minalal fell back on the argument that as Kharsetji had in Suit No. 412 of 1898 sued the Bakhatram firm for cancellation of the instalment-bond on the grounds now sought to be raised in answer to the claim for the 3rd, 4th and 5th instalments and that suit was dismissed in final appeal as time-barred, Kharsetji should be treated as barred by the law of limitation from raising the pleas he now seeks to raise in the present suit. The case of *Mahomed Cassum v. Joseph Ezekiel*⁽²⁾ was relied upon, where it was said by Tyabji, J.: "It is equally clear that a party cannot be allowed to make a claim as defendant which he could not make as plaintiff by reason of limitation."

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(1) [1895] 1 Ch. 37 at p. 50.

(2) (1905) 7 Bom. L. R. 772 at p. 787.

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But Kharsetji is not making a claim, he is resisting a claim made against him, and in *Rangnath v. Govind*,⁽¹⁾ which was decided by a Divisional Bench, it was clearly laid down: "A defendant is entitled to resist a claim made against him by pleading fraud, and he is entitled to urge that plea, though he may not have himself brought a suit to set aside the transaction, and is not, in circumstances like the present, precluded from urging that plea by the lapse of time."

On the same principle the defendants were allowed to raise a defence based upon grounds which would have entitled them to rectification of the instrument sued on, if they had brought a suit within the period of limitation to obtain that relief. In *Mahendra Nath v. Jogendra*⁽²⁾ where Maclean, C. J., said: "I think it is only equitable that it should be open to the defendants to raise this defence" (of mutual mistake) "and that they ought not to be driven to a separate suit to rectify, which, I understand, would now be barred by the Statute of Limitation."

So here; and a defendant, who has sued for rectification of a money-bond after the period of limitation for such a suit has expired and has failed on the ground of limitation, would not apparently be in a worse position than a defendant who has never sued for rectification.

The conclusion I come to therefore is that the questions raised in the issues 4 and 5 in the Court of first instance are not *res judicata* and Kharsetji is entitled to have them adjudicated in the present suit.

The decree must therefore be reversed and the case remanded to the Court of first instance under section 562 for decision on the merits on the issues 3, 4, 5, 6, 7; evidence under those issues to be taken.

There must be a fresh finding as to when the plaintiff attained majority, the parties being given opportunity to adduce further evidence on this point. Costs to be costs in the suit and abide the result.

SCOTT, J.:—The plaintiff sued to recover from the defendant Rs. 3,000 for principal and Rs. 705 for interest. The Rs. 3,000 was claimed as the aggregate of three instalments of Rs. 1,000 each

(1) (1904) 28 Bom. 689; 6 Bom. L. R. 592.

(1897) 2 Cal. W. N. 240 at p. 262.

due in respect of the 3rd, 4th and 5th instalments under a bond, dated the 19th of June 1894, for Rs. 10,534-15-6, which was payable by yearly instalments of Rs. 1,000.

The bond had been passed in settlement of a sum of Rs. 11,534-15-0, which was alleged by the plaintiff to be due upon accounts stated between him and the defendant. The balance of the sum alleged to be due was provided for, on the day the bond was passed, by the payment in cash of Rs. 400 and a Hundi for Rs. 600.

The Hundi having been dishonoured, the plaintiff in 1895 filed Suit No. 249 of 1895 in the First Class Subordinate Judge's Court at Dhulia, to recover the Rs. 600 and interest. To the claim in that suit the defendant put in a written statement pleading that *although some money had been due* by him to the plaintiff he was induced, when harassed by his creditors, to rely upon the plaintiff's statement of account wherein, as he had since discovered, the plaintiff had falsely entered a sum as due in respect of certain *savda* transactions in which the defendant was under no liability whatever, and that the Hundi sued on being given in respect of a false loss was without consideration. The Court thereupon framed one issue only, "Is the Hundi sued on without consideration?" and appointed a Commissioner to examine the plaintiff's accounts. The Commissioner having reported that only Rs. 3,016-3-0 and not Rs. 11,534-15-0 was due, the Court awarded the plaintiff's claim on the ground that the total so found due exceeded the amount of the claim on the Hundi. The defendant does not appear ever to have challenged this finding as to the amount of his indebtedness.

In 1897 the first two instalments under the bond having become due, the plaintiff sued to recover them in Suit No. 105 of 1897. No written statement was put in, but the defendant's pleader agreed, without trial and without raising any issue, to a decree for Rs. 2,179 as claimed. As the Purshis then recorded has been relied upon as evidence of a compromise under which the validity of the bond as a whole was admitted, it is necessary to set it out *in extenso*—

"The defendant is to pay to the plaintiff Rs. 2,179 as claimed, and costs in proportion, whatever the same may amount to, by

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the end of Kartik in Shake 1319 (24th November 1897); he is not to pay interest after the date of suit. If the defendant fails to pay the above-mentioned Rs. 2,179 and costs by the end of Kartik, *i.e.*, at the fixed time as agreed to (by him), he is to pay interest at the rate of 0-8-0, eight annas per cent. per month, from the date of suit to the end of Kartik in Shake 1319 (24th November 1897). A decree may be passed in the foregoing terms. The date the 24th of June in the year 1897."

The plaintiff having by the cash payment of Rs. 400 and by the two decrees for Rs. 600 and 2,179 recovered the full amount found to be due by Commissioner appointed in Suit No. 249 of 1895, the defendant appears to have been minded to get rid of any further litigation by suing for the cancellation of the bond. With this object he filed Suit No. 412 of 1898, alleging that the bond was fraudulent and void in law as it had been passed in respect of wagering transactions. The suit was decided in his favour by the original Court, but was dismissed in appeal by this Court on the ground that the suit for cancellation was time-barred, but no decision was given on the issues of fraud or invalidity under section 30 of the Contract Act.

The plaintiff instituted the present suit in 1902 to recover as above stated the 3rd, 4th and 5th instalments of Rs. 1,000 each under the bond. In the first Court the first issue raised was whether the defendant is estopped from raising any contentions against the bond sued on.

The 4th, 5th and 6th issues were—

4. Whether the bond and the prior Ruzu are proved to have been obtained by fraud and misrepresentation?
5. Whether the debt was due on wagering contracts, and, therefore, unenforceable by law?
6. Whether the defendant can claim to re-open the account, and if so, whether any and what balance turns up due by defendant to plaintiff on taking an account afresh?

The first issue having been found against the defendant, the Subordinate Judge decided that any finding on issues 4 and 5 was unnecessary, and that issue 6th must be decided against the defendant. He then passed judgment for the plaintiff for Rs. 3,000 and interest as claimed.

The defendant having appealed to the District Judge's Court, that Court varied the decree by disallowing the claim for the 3rd and 4th instalments as barred by limitation. The decree for the plaintiff was thus reduced to Rs. 1,000 and interest.

From the decree of the District Court both parties have appealed. The plaintiff on the ground that his claim for the 3rd and 4th instalments was wrongly held to be barred by limitation; and the defendant, on the ground that the lower Courts erred in holding that he was barred by *res judicata* from pleading in the present suit; that the bond was no longer supported by any consideration, or that the consideration, if any, was a wagering debt, or that the transaction was vitiated by fraud.

The District Judge disposed of the argument that the bond was no longer supported by any consideration in these words: "As a matter of law mere inadequacy of consideration apart from fraud is no defence. Mere inadequacy of consideration will not make the bond either wholly or partially voidable." His judgment upon this point is contrary to the decision in *Forman v. Wright*⁽¹⁾ and cannot be supported. In *Forman v. Wright*⁽¹⁾ Cresswell, J., said: "A small consideration may sustain a larger promise. Where there is a promise to pay a certain sum, all being, as in this case, supposed to be due, each part of the money expressed to be due is the consideration for each part of the promise; and the consideration as to any part failing, the promise is, *pro tanto*, *nudum pactum*. The rules of pleading require that a plea of no consideration, to a bill or note, which *prima facie* imports consideration, shall show how the want of consideration arises. In the present case it is shown thus,—by a statement that the note was obtained from the defendant by the plaintiff by a false representation that £32-6-10 was due when in fact £10-14-11 only was due. The plea, it is true, goes on to state that that representation was made *fraudulently and deceitfully*. It was enough, however, that the representation was untrue... The consideration for the note failed as to so much as the misrepresentation applied to." Before the present suit was brought the issue as to consideration had not been raised except with reference

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(1) (1851) 11 C. B., 488 at p. 494.

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to the Hundi and had been heard and determined in Suit No. 249 of 1895 with reference to that document alone. The defendant was therefore not barred by *res judicata* from pleading in this suit that the bond was no longer supported by consideration.

The lower Court was also wrong in holding that the defendant is barred by section 13 of the Civil Procedure Code from raising the questions of fraud or wager as vitiating the bond as a security for the payment of the remaining instalments. The issue in Suit No. 249 of 1895 was a sufficient issue for the disposal of the case on the Hundi, and in that suit the defendant's liability under the Hundi was the only matter in issue. In Suit No. 105 of 1897 there was no hearing and disposal of any matter in issue and the provisions of section 13 have therefore no application. It has, however, been argued that the consent decree in the last mentioned suit operates as an estoppel by judgment which prevents the defendant from raising the pleas of fraud and wager, but when the facts of the case and the wording of the Purshis, above set out, are borne in mind the reason and the scope of the consent decree at once become apparent. A decree for the amount claimed was then submitted to because that amount fell within the sum found due by the Commissioner and to the claim for Rs. 2,000 and interest the pleas of failure of consideration, fraud and wager would have afforded no defence. The consent was in no degree an admission that the balance mentioned in the bond which then remained unpaid would thereafter be payable.

Mr. Setlur also contended that the right of the defendant to claim cancellation of the bond on the ground of fraud being barred, he could not as a defendant plead fraud as a defence to any claim on the bond. He relied upon the decision of Tyabji, J., reported in *Mahomed v. Ezekiel*⁽¹⁾. We are, however, bound by a contrary decision in *Rangnath v. Govind*⁽²⁾.

The fact that the defendant was, owing to the bar of limitation only, denied the specific relief of cancellation claimed in Suit No. 412 of 1898 cannot prevent him from raising defences on the merits as a defendant in this suit.

(1) (1905) 7 Bom. L. R. 772 at p. 787.

(2) (1904) 28 Bom. 639: 6 Bom. L. R., 592.

The decree must be set aside and the case remanded for trial on the issues 4, 5 and 6 raised by the Subordinate Judge. And by the agreement of the parties further evidence may be recorded, if forthcoming, on the question as to when the plaintiff attained majority.

Decree reversed. Case remanded.

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APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

THE SURAT CITY MUNICIPALITY (ORIGINAL DEFENDANT 1), APPELLANT, v. CHUNILAL MANEKLAL GHANDI (ORIGINAL PLAINTIFF), RESPONDENT.*

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District Municipal Act (Bom. Act III of 1901)—District Municipal Election Rules, Rule 13⁽¹⁾—Plaintiff candidate for election as Councillor—Plaintiff's name not published in the list of candidates—Receiving Officer—Suit against Municipality—Declaration—Injunction.

The plaintiff offered himself as a candidate to be elected a Councillor in the Municipal elections, but his name was not included in the list of candidates

* Appeal No. 20 of 1905 against an order of remand.

(1) District Municipal Election Rules, Rule 13 (see Jamietram and Chimanlal's Bombay Acts and Regulations, Volume II, page 595).

13. (1) Every person who desires or is willing to become a candidate for a Municipal Commissionership must be nominated in writing for this purpose by two persons entitled to vote at the election for such Municipal Commissionership, and the nomination paper must bear an endorsement signed by the nominee signifying his willingness to serve, if he should be elected, and be delivered to the officer appointed by the Collector for this purpose, at least seven days before the date fixed for the election.

(2) The said officer shall, if any nomination paper is prepared and delivered to him in accordance with sub-section (1), and if the nominators establish to his satisfaction that they are entitled to vote at the election and that the nominee is qualified as a candidate, include the nominee's name in a list of candidates which shall be prepared under his signature and posted up at the Municipal Office, or, in the case of a new Municipality, at the Village Chavdi or such other place as the Collector appoints for this purpose, and at the place at which the election is to be held and in other conspicuous places, at least five days before the date fixed for the election.

(3) When, in a Municipal District, which has been sub-divided for electoral purposes into wards, elections are to be held at or about the same time in two or more wards, one and the same person may be nominated for election in all or in any number of the said wards.

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published by the Receiving Officer appointed by the Collector under Rule 13 of the District Municipal Election Rules. The plaintiff thereupon brought a suit against the Municipality for a declaration that he was entitled to be elected a Councillor at the elections and for an injunction restraining the Municipality from holding the elections without accepting him as a candidate and without receiving the votes of his voters.

The first Court rejected the plaint on the ground that it disclosed no cause of action. On appeal by the plaintiff the Judge reversed the order and remanded the proceedings for decision of the suit according to law.

On appeal by the Municipality,

Held, reversing the order of remand, that the suit for a declaration against the Municipality could not lie because the Municipality neither denied nor was interested to deny the character or right which the plaintiff sought to establish. It was the officer mentioned in Rule 13 of the District Municipal Election Rules that was concerned with that question and over him the Municipality had no control.

The claim for an injunction could not be sustained against the Municipality when it had done no wrong and had proposed to proceed in accordance with the District Municipal Act (Bom. Act III of 1901) and the Rules so far as they relate to it.

APPEAL against the order of remand passed by H. L. Hervey, District Judge of Surat, reversing the order of J. E. Modi, First Class Subordinate Judge, rejecting a plaint.

At the time of the election of Councillors for the Surat City Municipality, the plaintiff offered himself as one of the candidates, but his name as such candidate was not included in the list of candidates published by the Receiving Officer appointed by the Collector under Rule 13 of the District Municipal Election Rules. The plaintiff thereupon brought a suit against the Municipality for (a) a declaration that he was entitled to stand as a candidate and to be elected a Councillor and (b) an injunction restraining the Municipality from holding the elections without accepting the plaintiff as a candidate and without receiving the votes of his voters.

The Subordinate Judge rejected the plaint, holding that it disclosed no cause of action against the defendant Municipality.

On appeal by the plaintiff the Judge, relying on *Sabhapat Singh v. Abdul Gaffur* ⁽¹⁾ and *Rogers v. Rajendro Dutt* ⁽²⁾, reversed the

(1) (1896) 24 Cal. 107.

(2) (1860) 8 Moo. I. A. 103.

order and remanded the proceedings in order that the plaint might be admitted and the suit proceeded with according to law.

Against the said order of remand the defendant appealed.

H. C. Coyaji for the appellant (defendant):—The Judge in appeal has taken a wrong view of the law. The Subordinate Judge was right in holding that the plaint did not disclose any cause of action against the Municipality. Up to the time of the presentation of the plaint the Municipality had not done any act for which a suit could lie at the instance of the plaintiff. Whatever was done was done by the officer appointed by the Collector to receive the nomination papers under Rule 12 of the Surat Municipal Election Rules. According to Rule 13, if the nominators satisfy the Receiving Officer that they are entitled to vote, and that the proposed candidate is qualified, the officer shall include the name of the candidate in the list of candidates to be published. If the officer commits an error and omits to include in the list the name of a candidate, a suit may lie against him but not against the Municipality, because the Municipality has no discretion or power in the matter. The Municipality cannot accept any candidate whose name is not included in the list published by the Receiving Officer. It has merely to arrange for conducting the election work.

The case of *Sabhapat Singh v. Abdul Gaffur*⁽¹⁾ referred to by the Judge is not in point. It was a suit brought by one candidate against rival candidates after the election was held and set aside. Further, the Bengal Amendment Act expressly reserves the jurisdiction of Civil Courts.

The present suit is premature. The plaintiff ought to have waited till the election took place and then he might have questioned the validity of the election by applying to the District Judge under section 22 clause (1) of the District Municipal Act. There being a special remedy provided for by the Act, the present suit for a declaration and an injunction against Municipality cannot lie. *Rogers v. Rajendro Dutt*⁽²⁾ is also not in point.

L. A. Shah (with *M. K. Mehta* and *N. M. Samarth*) for the respondent (plaintiff):—The plaint does disclose a cause of

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(2) (1860) 8 Moo. I. A. 103.

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action and the order of the Judge is correct. Under section 12 of the District Municipal Act the plaintiff is qualified to stand as a candidate at the bye-election to be held under section 18 to fill up the vacancy caused by the plaintiff's being disabled under paragraph 2 of section 15 of the Act. Disability is quite a different thing from disqualification. The Receiving Officer appointed by the Collector under Rule 12 of the Surat Municipal Election Rules ought to have included the plaintiff's name in the list of candidates. On the 13th August 1904 the Receiving Officer returned the nomination papers to the plaintiff, who on the same day filed a suit against the officer for a declaration as to his qualification and for an injunction restraining him from publishing the list of candidates without including the plaintiff's name in it. The Subordinate Judge refused to grant the *interim* injunction. On the 18th August the Receiving Officer published the list of candidates without including the plaintiff's name in it. Hence the present suit against the Municipality was filed on the 19th August 1904.

The duty of holding the election is cast by the District Municipal Act upon the Municipality. It cannot escape liability by saying that it is not responsible for any error committed at an early stage by the officer appointed by the Collector to receive the nomination papers. We submit that the process of election from beginning to end should be treated as one whole transaction. After a certain stage the Municipality has to see that the election is carried through. Though it may not be responsible for what the officer might do, still the effect of the election being carried out will be the denial of a legal right to the plaintiff. The Municipality may not have directly denied the plaintiff's right, but by proceeding with the election it does an act the effect of which is to deny the plaintiff's right, and thus in effect denies and becomes interested in denying the plaintiff's right. To treat the different stages in the election as entirely disconnected would be to ignore the scheme of the Election Rules and to leave the plaintiff without a remedy for a wrong: *Rogers v. Rajendro Dutt*⁽¹⁾. The Judge has rightly held that no Court of equity

(1) (1860) 8 Moo. I. A. 103.

will view such result with equanimity. Under the English Statutes there is express provision as regards the remedy when the right of any person to stand as a candidate is denied, see 35 and 36 Vict., ch. 60, section 12; 38 and 39 Vict., ch. 40, section 3; 45 and 46 Vict., ch. 50, section 87 and Sch. III, Part II, cl. 14. The Bombay District Municipal Act makes no such provision, therefore, the ordinary remedy by a suit under section 11 of the Civil Procedure Code ought to be open to the plaintiff against all those who were concerned in carrying out the election.

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Under section 42 of the Specific Relief Act such a suit would lie. The plaintiff is entitled to a legal character and he can institute a suit to establish his status: *Sabhapat Singh v. Abdul Gaffur*.⁽¹⁾ No doubt the Bengal Amendment Act of 1894 expressly reserves the jurisdiction of Civil Courts, but in the case referred to the election was held under the old Act before the Amendment Act was introduced, still it was held that the suit was maintainable in a Civil Court.

It was argued that a remedy is open to the plaintiff under section 22 of the Bombay District Municipal Act, therefore, the present suit cannot lie. We contend that the section does not afford any remedy. Under clause 5 of that section an election cannot be set aside for any error, irregularity or informality. So even if the plaintiff had applied to the District Judge under clause (1) of section 22 and had questioned the validity of the election on the ground that his name was wrongfully omitted from the list of candidates, still the plaintiff would not have got adequate relief because it is doubtful whether the Judge could, under clause (5) of the section, set aside the election on the ground that the Receiving Officer wrongly omitted the plaintiff's name from the list of candidates. Therefore the only way for the plaintiff to get relief was by a suit in a Civil Court. No doubt it is discretionary with the Court to give the declaration and injunction, but when there is no other remedy, a Court of equity will always give relief.

Under section 45 of the Specific Relief Act the High Courts have, within the limits of their original jurisdiction, power to

(1) (1896) 24 Cal. 107.

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make an order requiring any specific act to be done or forbore by a corporation when there is no other specific and adequate legal remedy. Under section 42 of the Act the Mofussil Courts have the power to give relief similar to that provided by section 45.

Coyaji was not called upon to give a reply.

JENKINS, C. J.:—The suit admittedly is now to be treated as one only against the Municipality. It seeks a declaration and an injunction.

A declaration can only be sought in a suit against any person denying or interested to deny the title of the plaintiff to a particular character or right.

But the Municipality neither denies nor is interested to deny the character or right which the plaintiff seeks to establish. It is the officer mentioned in Rule 13 that is concerned with that question, and over him the Municipality has no control. Therefore the suit for a declaration fails.

The claim for an injunction too cannot be sustained. The Municipality has done no wrong and is threatening to do no wrong; it only proposes to proceed in accordance with the Act and the Rules so far as they relate to it. Therefore no ground is established for an injunction.

And as a declaration and an injunction are the only reliefs sought against the Municipality, and as the ground for each of those reliefs fails, it is clear that the Judge of the first Court rightly held that the plaintiff's suit disclosed no cause of action. We are therefore of opinion that the order of the District Judge should be set aside and the decree of the first Court restored with cost throughout.

Order set aside.

G. B. R.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Aston.*

BALAJI BIN KHANDUJI PATIL, APPLICANT, v. KUSHABA BIN
RAMJI PATIL, OPPONENT.*

1936.

February 1.

Mamlatdars Courts Act (Bom. Act III of 1876), section 17†—Possessory Suit—Decision—Duty of the Mamlatdar to order Village Officers to give effect to his order—Duty absolute and unqualified—Limitation Act (XV of 1877) not applicable.

Where a Mamlatdar's decision awards possession, section 17 of the Mamlatdars Courts Act (Bom. Act III of 1876) imposes on him the duty to issue an order to the village officers to give effect thereto. The duty is in no sense conditional on an application being made to the Mamlatdar for the purpose ; it is absolute and unqualified.

Where such imperative duty is imposed upon a Court, then the Limitation Act (XV of 1877) has no application.

Kylasa Goundan v. Ramasami Ayyan⁽¹⁾, *Vithal Janardan v. Vithojirav Putlajirav*⁽²⁾, *Ishwardas Jagjivandas v. Dosibai*⁽³⁾, and *Devidas Jagjivan v. Pirjada Begam*⁽⁴⁾ followed.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) of the High Court against the order of Rao Saheb S. A. Palshikar, Mamlatdar of Khed in the Poona District, giving effect to a decision in a possessory suit.

One Kushaba bin Ramji Patil filed a possessory suit, No. 99 of 1900, against Babaji bin Khundoji Patil in the Court of the

* Application No. 291 of 1905 under the extraordinary jurisdiction.

† Section 17 of the Mamlatdars Courts Act (Bom. Act III of 1876).

17. If the Mamlatdar's decision be for awarding possession or restoring a use, he shall issue an order to the village officers to give effect thereto.

If it be for granting an injunction, he shall cause the same to be prepared in the form of Schedule C, and shall deliver or tender the same then and there to the defendant, if he be present, and if he be not present, shall send it to the village officers to be served upon him.

When the Mamlatdar awards costs, such costs, together with the costs of execution, shall be recovered from the party in person, and in the event of non-payment, by the attachment and sale of his property.

(1) (1881) 4 Mad. 172.

(3) (1882) 7 Bom. 316.

(2) (1882) 6 Bom. 586.

(4) (1884) 8 Bom. 377.

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Mamlatdar of Khed in the Poona District and the Mamlatdar allowed the claim on the 31st May 1900. After the said decision Kushaba took no further steps with respect to it till the 1st September 1905, when he applied to the Mamlatdar to carry it out, and the Mamlatdar, without giving notice to Babaji of the said application, passed an order on the 22nd September 1905 directing that the possession of the land to which his decision related be given to Kushaba and an acknowledgment in respect of the same be taken from him. Till the date of the said order the lands continued in the possession of Babaji, and he being deprived of it under the said order, preferred an application under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) urging that the Mamlatdar had no jurisdiction to entertain Kushaba's application for an order giving effect to his decision after the lapse of more than five years from its date, that the Mamlatdar acted with material irregularity in giving no notice of the intended execution and that he ought to have referred Kushaba to a Civil Court for redress. A *rule nisi* was issued requiring Kushaba to show cause why the order of the Mamlatdar should not be set aside.

Anant G. Desai appeared for the applicant in support of the rule:—It is not disputed that the proceedings to execute the Mamlatdar's original order were commenced more than three years after its date. Therefore under Article 179 of the Limitation Act the execution was clearly time-barred. It is true that there is no specific provision in the Mamlatdars' Act prescribing a period within which the Mamlatdar's order should be executed, but the general frame of the Act clearly shows that the Legislature intended thereby to give speedy relief in cases mentioned in section 4 of the Act. It is, therefore, plain that proceedings in execution should not be delayed. Otherwise the successful party will sleep over his rights, allow the other party to remain in possession and thereby induce him to spend large sums of money in the improvement of the property, and then all of a sudden, after the lapse of a very long period, apply to the Mamlatdar to execute his order. Such a state of affairs will lead to disastrous consequences in every possible way. The

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Mamlatdar's order being not executed, a man may acquire title to land by adverse possession and yet his title would be of no avail because the Mamlatdar can execute his order at any time. It cannot be said that the Legislature ever meant to endow the Mamlatdar with unlimited powers of execution and set at nought settled rights between parties. As the Mamlatdars' Act is intended to give speedy relief, it follows that the Mamlatdar's orders should be speedily executed or at least within three years at the latest. The provisions of the Civil Procedure Code are not applicable to the Mamlatdar's Court, *Kasam Sahēb v. Maruti*⁽¹⁾, *Shankar Ramlal v. Martandrao*⁽²⁾, *Ganpatram Jebhai v. Ranchhod Harihbhai*⁽³⁾, *Rakhma v. Tulaji*⁽⁴⁾, but we submit that a distinction should be drawn between questions of procedure and questions of limitation. Questions of procedure protract litigation and thereby cause delay. Such questions are not consistent with the scope of the Mamlatdars' Act. But such is not the case with questions of limitation. There is no decision which emphatically lays down that the Mamlatdars' Courts are not governed by the provisions of the Limitation Act. On the other hand, there is a *dictum* in *Navalchand Nemchand v. Amichand Talakchand*⁽⁵⁾, which shows that section 14 and Article 179 of the Limitation Act would apply to proceedings in execution under the Mamlatdars' Act.

V. G. Ajinkya appeared for the opponent to show cause :—The Mamlatdars' Act being a special enactment, it has its own procedure, its own limitation of six months under section 4 and its own mode of executing decrees under section 17. There is no fixed period of limitation for the execution of the Mamlatdar's order, therefore, the general provisions of the Limitation Act cannot be held applicable to a special enactment like the Mamlatdars' Act. Further, Article 47 of the Limitation Act provides the period during which a party aggrieved by the Mamlatdar's decision can bring a regular suit to set aside that decision. This shows that the framers of the Limitation Act had, when they framed that Act, in view the Mamlatdars' Act. Therefore, if

(1) (1888) 13 Bom. 552.

(3) (1892) 17 Bom. 645.

(2) (1889) 14 Bom. 157.

(4) (1894) 19 Bom. 675.

(5) (1893) 18 Bom. 734.

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they wanted to lay down any period for the execution of the Mamlatdar's order, they would have easily done that under Article 179 of the Limitation Act or by inserting a provision to that effect in the Mamlatdars' Act. Section 17 of the Mamlatdars' Act, which provides for execution, contains the words "order" or "decision," while Article 179 of the Limitation Act contains the word "decree". This distinction in the terms goes to show that the Limitation Act applies to decrees passed under the Civil Procedure Code: *Golam Gaffar Mandal v. Goljan Bibi*⁽¹⁾.

It has been held that the provisions of the Civil Procedure Code are not applicable to Courts constituted under the Mamlatdars' Act, but it has been also held that the law of limitation is the law of procedure: *Her Highness Ruckmaboye v. Lulloobhoy Mottichund*⁽²⁾. Therefore the law of limitation cannot apply to proceedings held under the Mamlatdars' Act.

Where an imperative duty is cast upon a Court to do a certain thing, it is not necessary to a party to apply to the Court to do that thing. If any such application be made, it merely reminds the Court of its duty and the statute of limitation has no application: *Kylasa Goundan v. Ramasami Ayyan*⁽³⁾, *Vithal Janardan v. Vithojirav Putlajirav*⁽⁴⁾, *Devidas Jagjivan v. Pirjada Begam*⁽⁵⁾, *Bai Manekbai v. Manekji*⁽⁶⁾, *Ishwardas Jagjivandas v. Dosibai*⁽⁷⁾, *Darbo v. Kesho Rai*⁽⁸⁾, *Shivapa v. Shivpanch Lingapa*⁽⁹⁾, *Kalu v. Latu*⁽¹⁰⁾, *Puran Chand v. Roy Radha Kishen*⁽¹¹⁾, and *Dwarka Nath Misser v. Barinda Nath Misser*⁽¹²⁾.

Where the Court fails to do its duty, no party should suffer for the Court's default: *Bhagwanlal v. Chhabilbhai*⁽¹³⁾.

If the Mamlatdar has committed an error in executing his order, it is an error of law and it cannot be interfered with under section 622 of the Civil Procedure Code: *Hari Bhikaji v. Naro Vishvanath*⁽¹⁴⁾.

The remarks in *Navalchand v. Amichand*⁽¹⁵⁾ are mere *obiter dicta*.

(1) (1897) 25 Cal. 109.

(8) (1887) 9 All. 364.

(2) (1851-52) 5 Moo. I. A. 234.

(9) (1886) 11 Bom. 284.

(3) (1881) 4 Mad. 172.

(10) (1893) 21 Cal. 259.

(4) (1882) 6 Bom. 586.

(11) (1891) 19 Cal. 132.

(5) (1884) 8 Bom. 577.

(12) (1895) 22 Cal. 425.

(6) (1883) 7 Bom. 213.

(13) (1896) P. J., p. 600.

(7) (1882) 7 Bom. 316.

(14) (1885) 9 Bom. 432.

(15) (1893) 18 Bom. 734.

Desai, in reply :—The word “decree” is not foreign to the Mamlatdars’ Act, see section 15. Therefore it cannot be said that the Mamlatdar’s order is not a decree within the meaning of Article 179 of the Limitation Act.

The provisions of the Civil Procedure Code are held to be inapplicable to the Mamlatdars’ Court simply because the machinery of the Code is cumbrous and causes delay, yet under the Mamlatdars’ Act minors are allowed to sue by next friends and be sued by guardians *ad litem*: *Dattatraya Keshav v. Waman Govind*⁽¹⁾, *Shidapa v. Narsinhacharya*⁽²⁾. There is no provision in the Mamlatdars’ Act with respect to minors, see also Government Resolution No. 5272 of the 4th August 1891, where Article 179 of the Limitation Act is held applicable.

The principle laid down in *Bai Manekbai v. Manekji*⁽³⁾ that Article 178 of the Limitation Act applies only to applications under the Civil Procedure Code is too broad. Applications under section 89 of the Transfer of Property Act are held to be governed by Article 178 or 179 of the Limitation Act, *Chunni Lal v. Harnam Das*⁽⁴⁾, *Bhagawan v. Ganu*⁽⁵⁾.

The ruling in *Kylasa Goundan v. Ramasami Ayyan*⁽⁶⁾, and others that follow it can have no application to the Mamlatdars’ Act. In those cases there was a determination of substantive rights of parties irrespective of the delay caused in administering justice. Mamlatdars’ Act does not purport to settle disputes about titles, but its object is to protect possession and cultivation. Despatch is therefore to be secured before justice. The party aggrieved by the Mamlatdar’s order can seek redress in Civil Court, subject to the limitation laid down in Article 47 of the Limitation Act or section 21 of the Mamlatdars’ Act.

It may not be incumbent on a party to apply for execution, but the usual practice is to do so: *Tukaram v. Satvaji*⁽⁷⁾.

Even if Article 178 or 179 of the Limitation Act be held not applicable, still the delay in the execution of the Mamlatdar’s order should not now operate to our prejudice.

(1) (1895) P. J., p. 349

(2) (1896) P. J., p. 727.

(3) (1880) 7 Bom. 213.

(4) (1898) 20 All. 302.

(5) (1899) 23 Bom. 644.

(6) (1881) 4 Mad. 172.

(7) (1881) 5 Bom. 206.

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In making Article 179 of the Limitation Act applicable to an application under section 89 of the Transfer of Property Act, it was observed in *Chunni Lal v. Harnam Das*⁽¹⁾, that if it be held that there was no limitation to an application under that section, the decree-holder might postpone without loss of any rights his application for fifty years after the date when he obtained his decree under section 88 of the Act, as there would be nothing in the Limitation Act to bar his application. The Calcutta High Court, though it held in *Tiluck Singh v. Parsotein Proshad*⁽²⁾ that an application under section 89 of the Transfer of Property Act is not governed by Article 178 of the Limitation Act, remarked that in dealing with such application the Court may be guided by considerations as to whether any delay on the part of the mortgagee has not been unreasonable so as to bring it within the rules applied in such cases by Courts of equity. See also *Bhagawan v. Ganu*⁽³⁾. The ruling in *Navalchand v. Amichand*⁽⁴⁾ fortifies our contention that the provisions of the Limitation Act should be made applicable to execution proceedings under the Mamlatdars' Act.

The Court can interfere under section 622 of the Civil Procedure Code. The question of limitation is a question of jurisdiction. The Mamlatdar had no jurisdiction to execute his order after it became time-barred : *Kailash Chandra Halder v. Bissonath Paramanic*⁽⁵⁾, *Har Prasad v. Jafar Ali*⁽⁶⁾.

JENKINS, C. J. :—Where a Mamlatdar's decision, as in this case, awards possession, section 17 of the Mamlatdars' Courts Act imposes on him the duty to issue an order to the village officers to give effect thereto. That duty is in no sense conditional on an application being made to the Mamlatdar for the purpose ; it is absolute and unqualified.

If it be brought to the notice of the Mamlatdar that the duty thus imposed upon him has not been carried out, that is not an application without which the Mamlatdar could not act ; it is merely a means of apprizing the Mamlatdar of the omission on the part of himself or his officers.

(1) (1898) 20 All. 302

(2) (1895) 22 Cal. 924

(3) (1899) 23 Bom. 644.

(4) (1893) 18 Bom. 734,

(5) (1896) 1 Cal. W. N. 67.

(6) (1885) 7 All. 345.

Now there is a long line of authorities in India, *e. g.*, *Kylasa Goundan v. Ramasami Ayyan*⁽¹⁾, *Vithal Janardan v. Vithojirav Putlajirav*⁽²⁾, *Ishwardas Jagjivandas v. Dosibai*⁽³⁾ and *Devidas Jagjivan v. Pirjula Begam*⁽⁴⁾, whereby it is established that where an imperative duty of the character we have described is imposed upon a Court, then the Limitation Act has no application.

In the light of these authorities no case is made for our interference. We must accordingly discharge the rule with costs.

G. B. R.

Rule discharged.

ORIGINAL CRIMINAL.

Before Mr. Justice Batty.

EMPEROR v. BHASKAR BALWANT BHOPATKAR*.

Criminal Procedure Code (Act V of 1898), section 292—Act X of 1882, sections 289, 292—Adducing evidence—Documents put in during cross-examination by the accused or witnesses for the Crown—Right of reply.

1903.
February 12.

During the cross-examination of a witness for the Crown certain documents were put in evidence by Counsel for the accused which were not part of the record sent up to the Court by the Committing Magistrate. No witnesses were called for the defence. The Crown claimed the right of reply.

Held, that as the documents put in during the cross-examination of a witness for the Crown were tendered and relied upon by the defence as distinct from the evidence actually tendered by the prosecution and submitted for cross-examination, they must be regarded as evidence adduced by the accused, and that therefore the Crown had the right of reply.

CASE tried before Batty, J., and a Special jury. The accused who was the editor and publisher of a Maráthi newspaper called the "Bhala," was charged under section 124-A of the Indian Penal Code, in connection with the publication in his newspaper of an article entitled "A Durbar in Hell," with attempting to bring the Government into hatred or contempt, and with

* Case No. 5, First Criminal Sessions, 1906.

(1) (1881) 4 Mad. 172.

(3) (1882) 7 Bom. 316.

(2) (1882) 6 Bom. 536.

(4) (1884) 8 Bom. 377.

1906.

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attempting to excite feelings of disaffection against the Government established by law in British India. During the cross-examination of a witness for the Crown Counsel on behalf of the accused put in certain articles from the "Bhala" as evidence in the case. The articles in question had not been previously tendered by the prosecution, nor did they form part of the record sent up to the High Court by the Committing Magistrate. The case for the prosecution having been closed, Counsel for the accused stated he did not intend to call any witnesses. Counsel for the Crown thereupon claimed the right of reply.

Raikes, Acting Advocate-General, with him *Lowndes* and *Weldon*, for the prosecution.

We claim a right of reply under section 292 of the Code of Criminal Procedure (Act V of 1898). The former Code (Act X of 1832) provided that if the accused stated that he meant to adduce evidence, the prosecution should be entitled to reply, and the different High Courts took different views of the effect of sections 289 and 292 of the former Code: *Queen-Empress v. Krishnaji*⁽¹⁾ dissented from in *Queen-Empress v. G. W. Hayfield*⁽²⁾, *Queen-Empress v. Moss*⁽³⁾, *Queen-Empress v. Venkatapathi*⁽⁴⁾. The only reported case under the new Criminal Procedure Code is *Emperor v. Stewart*⁽⁵⁾. From this case it appears that the view we are contending for is now adopted by the Calcutta High Court: see Mr. Justice Geidt's judgment. The right of reply is frequently waived by the Crown where the evidence adduced by the accused does not seriously affect the question and where the Crown is not at a disadvantage in summing up the case. Here the case at the close of the evidence stands where it stood when we opened our case. We have very little more idea of the line of defence to be adopted by Counsel for the accused than we had at the commencement, and as the defence rely on the articles put in during the cross-examination of our witness, we submit we are entitled to hear what the other side have to say with regard to them before we put our case to the jury.

Davar with *Gadgil* for the accused.

(1) (1890) 14 Bom. 436.

(3) (1893) 16 All. 88.

(2) (1892) 14 All. 212.

(4) (1888) 11 Mad. 339.

(5) (1904) 31 Cal. 1050.

The accused has not lost the right of reply. In spite of repeated attempts to snatch that privilege from the accused the Bombay Court has constantly ruled against such attempts. We are not aware of a single case before the High Court Sessions in which the accused person, having put in documentary evidence in the course of the cross-examination of the Crown's witnesses, has forfeited his right of reply.

The authorities are conclusive as far as Bombay and Calcutta are concerned. Section 292 in the amended Code makes the law and procedure more favourable to the accused than the corresponding section in the Code of 1882. Section 289 does not differ in the two Codes.

As to section 292 there is a difference. In the former Code the Court calls upon the accused to say whether he wishes to call any evidence, and if he said he intended to adduce evidence the prosecution got the right of reply. Under the present Code the prosecution does not get that right unless the accused does as a matter of fact adduce evidence.

The meaning of the word "adduce" here is "Are you going to call any witnesses?", or "Are you going to put in any documentary evidence which you have not been able to put in during the case for the prosecution?" It seems to take it for granted that what has taken place before is not adducing evidence: *Hurry Churn Chuckerbutty v. The Empress*⁽¹⁾.

[BATTY, J.—Everything turns on the word "Adduce".]

Davar :—Mere formally putting on the record an exhibit in cross-examination is not adducing evidence. It is a distinction which has been the matter of judicial consideration.

Adducing evidence means leading evidence. We could lead evidence independently of the prosecution. The present is not evidence which we adduce.

We are not taking the prosecution by surprise. We put these articles in for the purpose of showing that the accused is no disloyal or disaffected subject of the Crown, but that he has been an impartial critic of Government. *Queen-Empress v. Krishnaji*⁽²⁾ is in our favour, and that ruling has been followed in every case as far as we know in these Courts.

(1) (1888) 10 Cal. 140.

(2) (1890) 14 Bom. 436.

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BHOPATKAR.

As far as reported cases are concerned we can remember no case in the Bombay High Court where the prosecution have been given the right to reply when documents only have been put in by the defence.

It has been laid down that when during the cross-examination of witnesses for the prosecution certain documents were put in on behalf of the accused this did not entitle the prosecution to the right of reply. That procedure has been followed in this case. The legislature does not intend by the word "Adduce" to include documents merely put in. It is not substantial evidence and the Crown is not entitled to a reply unless we give substantial evidence.

The section means that evidence has to be adduced on behalf of the accused with a view to shatter the evidence given by the prosecution witnesses.

Raikes in reply.

In this matter one must be guided by the Code and we submit that by the Code we have the right to reply. Compare the new with the old section. Under the old section the test was whether the accused when asked said that he was going to adduce evidence. Under the new section it says: "If the accused adduces any evidence." That very significant word "any" has been introduced into the new Code. Can it be said that putting in documents is not adducing "any" evidence? The legislature has done its best to make the matter clear by putting in that word. If merely a formal document were put in that would not take from the accused the right of reply. When a substantial mass of documents is put in which have not been read to the jury, it amounts, we submit, to adducing evidence. The only reported case bears out our contention.

BATTY, J.:—The original provision of the legislature was to make the right of reply dependent, not upon the actual adducing of evidence, but upon the accused's statement that he intended to adduce evidence. The ruling in *Hurry Churn Chuckerbutty v. The Empress*⁽¹⁾ with reference to that provision laid down the principle, that both sides should have the opportunity of com-

(1) (1883) 10 Cal. 140.

1906.

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menting upon the evidence of the other, so that no additional advantage should be given to either. I think that unless the phrase "adduces any evidence" applies to and includes the production and recording of documentary evidence which the defence places before the Court, it has no definite meaning at all. And evidence, therefore, which has been put in or is tendered and relied upon by the defence as distinct from the evidence actually tendered by the prosecution and submitted for cross-examination, must be regarded as evidence adduced by the accused. I think therefore that the amended section is intended to give a right of reply whenever at any stage, evidence is recorded for the defence which is not part of that adduced for the prosecution. The section makes the right of reply dependent upon the fact of evidence having been adduced. Earlier decisions relate only to a state of law which made the right of reply dependent on accused's statement as to his intention to adduce evidence, and those decisions have now no application. To adduce evidence is to lead evidence, and while the legislature recognized it as a hardship that the accused should be deprived of a right of reply by merely stating that it was intended to adduce evidence which eventually was not adduced at all, it clearly expressed its intention to give the prosecution the right of reply whenever evidence has actually been put in for the defence, which was not led by the prosecution. The words of the present section suggest that the legislature approved and adopted the principle laid down in I. L. R. 10 Calcutta⁽¹⁾, that each side should have an opportunity of commenting upon the evidence of the other side. I therefore hold that the Crown has in this case the right of reply.

W. L. W.

(1) (1883) 10 Cal. 140.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

1906.
June 21.

ABAJI ANNAJI (ORIGINAL DEFENDANT), APPELLANT, *v.* LAXMAN BIN
TUKARAM AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Indian Evidence Act (I of 1872), section 92—Redemption Suit—Sale out and out—Construction—Evidence of intention—Admissibility—Dekkhan Agriculturists' Relief Act (XVII of 1879).

Plaintiffs, who were agriculturists, brought a suit to redeem and the defendant contended that the transaction in suit was a sale out and out and not a mortgage. The lower Courts held that the transaction was a mortgage and allowed redemption.

Held, on second appeal by the defendant, that evidence of intention cannot be given for the purpose merely of construing a document which purported to be a sale out and out and not a mortgage; section 92 of the Indian Evidence Act (I of 1872), subject to the proviso therein contained, forbids evidence to be given of any oral agreement or statement for the purpose of contradicting, varying, adding to or subtracting from the terms of any contract, grant or other disposition of property the terms of which have been reduced to writing as mentioned in that section.

While there are restrictions on the admissibility of oral evidence, section 92 in its first proviso recognizes that facts may be proved by oral evidence which would invalidate a document or entitle any person to any decree or order relating thereto. And where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently.

SECOND appeal from the decision of D. G. Gharpure, First Class Subordinate Judge of Poona, confirming the decree of T. N. Sanjana, Subordinate Judge of Haveli.

The plaintiffs, who were agriculturists, sued for an account and redemption of the land in suit upon payment to the defendant of the amount due, if any, by annual instalments, alleging that the transaction, though in form a sale, was in reality a mortgage.

The defendant contended that the transaction in dispute was a sale out and out and that under it he entered into possession.

* Second appeal No. 619 of 1905.

1906.

ABAJI
v.
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The Subordinate Judge found that the plaintiffs had established the existence of circumstances entitling them to prove that the transaction was a mortgage and not a sale and that they had proved that such was the transaction. He, therefore, decreed redemption directing the plaintiffs to pay to the defendant Rs. 750 by yearly instalments of Rs. 100. With respect to the real nature of the transaction, the Subordinate Judge observed as follows :—

Although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill of sale, there was an oral agreement by way of defeasance, yet the Court will look to the subsequent *conduct* of the parties, and if it clearly appears from such conduct that the apparent vendee treated the transaction as one of mortgage, the Court will give effect to it as a mortgage and nothing more. *Baksu v. Govinda*, I. L. R. 4 Bom. 594. In this case, the vendee's conduct relied upon as showing that he has treated the transaction as a mortgage, is his own admission in suit No. 339 of 1896. That was a suit for redemption by a third person. Therein also there was a sale-deed taken, but there was a writing passed by the defendant acknowledging the mortgagor's right to redeem.

On appeal by the defendant the Judge confirmed the decree and in relation to the consideration for the transaction he made the following remarks :—

As to consideration, I was asked to act upon the frequent instances occurring in the Deccan, where bogus payments are made before village registrars. It is impossible to take such instances into consideration. Every case must be decided upon its own merits.

The defendant preferred a second appeal.

J. R. Gharpure for the appellant (defendant) :—The plaintiffs sued us for an account and redemption under the provisions of the Dekkhan Agriculturists' Relief Act. The suit was based upon a document which evidences a sale out and out. The sale was accompanied with delivery of possession and we took rent note in which the plaintiffs attorned to us. Subsequently we took actual possession from the plaintiffs. These are sufficient indications that the parties intended the transaction to be an absolute sale. The lower Courts were wrong in admitting oral evidence to prove that the transaction was really a mortgage and not a sale. They ignored the ruling of the Privy Council in

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Balkishen Das v. W. F. Legge ⁽¹⁾, and the rulings of the High Courts in *Achutaramaraju v. Subbaraju* ⁽²⁾, *Dattoo v. Ramchandra* ⁽³⁾, *Hanmant Narsinha v. Govind Pandurang* ⁽⁴⁾, and *Keshavrao v. Raya Pandu* ⁽⁵⁾. These decisions are in complete harmony with the principle laid down by the House of Lords in *North Eastern Railway v. Hastings (Lord)* ⁽⁶⁾.

The lower Courts have based their conclusion mainly on our admission in suit No. 339 of 1896. We contend that the admission is not covered by section 31 of the Evidence Act. It was made in a suit between us and a stranger. The present plaintiffs were not parties to that suit. Therein also a deed of sale was taken but there was a writing passed to the defendant acknowledging the mortgagor's right to redeem. We got possession of the land subsequent to that suit. An admission will be binding only when it operates as an estoppel: *Mussumat Oodey Koowur v. Mussumat Ladoo* ⁽⁷⁾, *Pertap Chunder v. Mohendronath* ⁽⁸⁾.

M. R. Bodas for the respondents (plaintiffs):—The lower Courts have come to a correct conclusion by the light of the decision in *Baksu Lakshman v. Govinda* ⁽⁹⁾ and the cases following it. We are agriculturists, and in cases between agriculturists and their money-lending creditors it is always the practice to advance money on an understanding that the document, though in form a sale, should operate as a mortgage. The transaction in suit was rightly held to be a mortgage having regard to the defendant's admission in suit No. 339 of 1896.

We further submit that the cases relied on do not apply. Evidence as to the conduct of parties may be gone into. The conduct is not to be investigated into as an oral agreement: *Khankar Abdur Rahman v. Ali Hafez* ⁽¹⁰⁾, *Mahomed Ali Hossein v. Nazar Ali* ⁽¹¹⁾.

(1) (1899) 22 All. 149.

(2) (1901) 25 Mad 7.

(3) (1905) 30 Bom. 119 : 7 Bom. L. R. 669.

(4) (1905) 8 Bom. L. R. 283.

(5) (1906) 8 Bom. L. R. 287.

(6) [1900] A. C. 260.

(7) (1870) 13 Moo. I. A. 555.

(8) (1889) 17 Cal. 291.

(9) (1880) 4 Bom. 594.

(10) (1900) 28 Cal. 256.

(11) (1901) 28 Cal. 289.

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Gharpure in reply :—The plaintiffs brought the present redemption suit in connection with a transaction which is a sale. They cannot get that relief in the present suit. They may bring another suit setting forth any of the circumstances mentioned in proviso (1) to section 92 of the Evidence Act and the evidence of the kind led in the present suit may be gone into in that suit.

JENKINS, C. J. :—The plaintiffs sue for redemption asking that an account may be taken under the provisions of the Deccan Agriculturists' Relief Act.

Their case in the plaint is that the transaction in respect of which they have brought this suit is a mortgage.

The defendant by his written statement asserts that the land was not mortgaged to him, but sold out and out.

If the document evidencing the transaction be looked at (and that alone), then it is clear that the transaction was, as the defendant states, a sale out and out.

The lower Courts, however, have decided this suit in the plaintiffs' favour holding that the transaction was a mortgage and not a sale.

The defendant appeals from the decree of the lower appellate Court.

For the appellant, in this Court, it is pointed out that neither Court has observed the principles established in the case of *Balkishen Das v. W. F. Legge* ⁽¹⁾, and that no attention has been paid to the decision of the Madras High Court in *Achutaramaraju v. Subbaraju* ⁽²⁾, or of this High Court in *Dattoo v. Ramchandra* ⁽³⁾.

It appears to us that this contention is not without foundation. It is clear that evidence of intention cannot be given for the purpose merely of construing a document such as that with which we are now concerned; and section 92 of the Evidence Act, subject to the proviso therein contained, forbids evidence to be given of any oral agreement or statement for the purpose of contradicting, varying, adding to, or subtracting from the terms of any contract, grant or other disposition of property the terms

(1) (1899) 22 All. 149.

(2) (1901) 25 Mad. 7.

(3) (1905) 30 Bom. 119 : 7 Bom. L. R. 669.

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of which have been reduced to writing as mentioned in that section.

We think the provisions of section 92 have not been sufficiently observed by the lower Courts.

But at the same time it would be wrong for us to reverse the decree of the lower appellate Court, for both the lower Courts seem to have erred in form rather than in substance. While there are the restrictions on the admissibility of oral evidence to which we have referred, section 92 in its first proviso recognizes that facts may be proved by oral evidence which would invalidate a document or entitle any person to any decree or order relating thereto. And where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently : see *Pertap Chunder Ghose v. Mohendranath Purkait* ⁽¹⁾.

This, we think, must have been in the mind of the Judge of the first Court when he raised the first issue in the form he did ; that issue runs as follows :—

Whether the plaintiffs prove the existence of circumstances entitling them to prove that the transaction was a mortgage and not a sale ?

We think, however, that the defendant is entitled to have the issue framed with greater particularity that he may have due warning of the case he has to meet. The materials before us do not enable us to do this with as much precision as we could wish, and the only issues we can frame are these :—

(1) Do the plaintiffs prove any fact which would invalidate the document or entitling them to any decree or order relating thereto ?

(2) Are the plaintiffs entitled to any, and what, relief ?

The investigation in the lower Courts has been inadequate ; therefore, the parties will be at liberty to adduce further evidence.

The return should be made in three months.

The frequency of the complaint that agriculturists are entrapped into the execution of documents of sale in the belief

(1) (1889) 17 Cal. 291 at p. 297.

that the right to redeem still remains with them, leads us to express the hope that there may be early legislation which will enable the Courts, at least where an agriculturist is concerned, to investigate and determine the real nature of the transaction, unfettered by section 92 of the Evidence Act, and to award such relief as the justice of the case may require.

Issues sent down.

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PRIVY COUNCIL.

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February 23,
27, 23.
May 9.

[On appeal from the High Court of Judicature at Bombay.]

Hindu Law—Inheritance—Law of Bombay School—Mitakshara—Vyavahara Mayukha—Succession to Stridhan—Co-widow—Husband's brother—Husband's brother's son—Deed of gift, construction of—Absolute or limited estate of inheritance—Vyavahara Mayukha, chapter IV, section 10, placita 28 and 30, construction of.

By the Hindu law of the Bombay School, *viz.*, the Mitakshara subject to the doctrine to be found in the Vyavahara Mayukha where the latter differs from it, a co-widow is entitled to succeed to the property of a woman dying without issue, in preference to her husband's brother or husband's brother's son.

A deed executed by a Hindu in favour of his future wife conveyed immovable property to her, "her heirs, executors, administrators and assigns" on the condition that if she died "without leaving issue of the intended marriage who shall succeed to a vested interest" in the property, and without exercising a power of appointment given her by the deed, then "the property shall vest in her legal heirs according to the Hindu law of the Bombay School."

Held, that she took an absolute estate of inheritance in the property.

The true construction of *placitum* 30 of chapter IV, section 10, of the Vyavahara Mayukha, and one that brings it into harmony with the Mitakshara, and also reconciles it with *placitum* 28, is that it should be read distributively as regards the property of women married according to one of the approved forms and the property of those married in one of the lower forms. In the one case those of the heirs enumerated by Brihaspati who are blood relations of the husband, namely, the husband's sister's son, the husband's brother's son, and the husband's brother will succeed to the woman's property and in the other case the relations of the father will succeed.

* *Present*: Lord Davey, Sir Andrew Scoble and Sir Arthur Wilson.

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The order of succession is not indicated in the series of heirs enumerated by Brihaspati. The solution is to be found by reference to *placitum* 28 in which the heirs are described as the nearest sapindas of the wife in the husband's family, or the nearest to her in her father's family, as the case may be. The list is not exhaustive, and neither a co-widow nor any other sapinda of the husband is excluded. The words "and the rest" mean or include the other relations of the husband or father. The co-widow therefore takes in her right place and is a preferential heir to the husband's brother or husband's brother's son.

APPEAL from a judgment and decree (December 11th, 1903) of the High Court at Bombay in its Appellate Jurisdiction which reversed a judgment and decree (February 21st, 1903) of the same Court in its Original Civil Jurisdiction and dismissed the appellant's suit.

The facts necessary for the determination of this appeal were undisputed and were as follows:—One Koreji Haridass, who died in January 1898, had two wives, Bai Kesserbai the plaintiff-appellant and one Kumari Bachubai. In contemplation of his marriage with Bachubai and before it took place, Koreji Haridass settled the immoveable property in suit upon Bachubai by a deed, dated 24th November 1892. The material provisions of this deed (which are set out in their Lordships' judgment) were to the effect that on Bachubai's death without issue after the marriage had been celebrated the property should be dealt with as she might by will or deed direct, and in the absence of any such direction by her, should vest in her legal heirs according to the Hindu law of the Bombay School.

Bachubai was married according to one of the approved forms of marriage and died on 9th May 1899, without issue and without making any appointment either by will or deed, leaving her surviving the plaintiff, who was her co-widow and the two defendants-respondents, Bai Mooghibai who was the widow of one Ranchoredas Haridas who admittedly survived Bachubai and who was a separated brother of Koreji Haridass, the deceased husband of the plaintiff and Bachubai; and Hunsraj Morarji who was the son of another separated brother of Koreji Haridass.

The two defendants both claimed the property in suit, and the plaintiff sued for a declaration that she was entitled to the

property in question, and that neither of the defendants was entitled. The plaintiff also asked for an account of rents and profits received by the first defendant's husband and by the defendants themselves, and for possession of the property.

The issues were : (for the first defendant) (1) whether on the death of Bachubai, Ranchoredas Haridas was not the heir of Bachubai and succeeded to the property mentioned in the plaint ; (2) whether the first defendant as widow of Ranchoredas is not entitled to the property, the subject-matter of this suit, as heir of Ranchoredas Haridas ; (for the second defendant) (3) whether the second defendant is not the heir of Bachubai.

The Judge sitting in the Original Side of the High Court (BATTY, J.) decided these issues in favour of the plaintiff. In his judgment he said :—

"There can be no doubt, and it is not indeed very seriously disputed, that the deed of gift purported to confer on Bachubai an absolute estate in the property as stridhan. It conferred a power of appointment and in case of her intestacy provided for its passing to her heirs. It was made by the husband out of affection and was of the sub-class known as prittidatta, or certainly at least of the class of parabhasika stridhan, and therefore must devolve according to the rules governing stridhan proper.

"The plaintiff therefore claims it as the nearest heir in the husband's family. The decision in *Manilal Rewadat v. Bai Rewa*⁽¹⁾ is relied on for the plaintiff as showing that the heir to succeed is the nearest to the woman herself though in her husband's family. *Vijiarangam v. Lakshuman*⁽²⁾ is relied on for the second defendant. A Privy Council case has also been cited, but appears to have no bearing on the case. The decision in *Vijiarangam v. Lakshuman*⁽²⁾ is undoubtedly binding in this Court. It is cited by Banerjee (Hindu Law of Marriage and Stridhan, Tagore Law Lectures for 1878, 2nd Edition, page 364) as in accordance with Kamalakar's interpretation of Vijayanesvara's rule that the successive heirs after the husband would be the step-son, the step-grandson, the rival wife, the step-daughter, her son, the husband's mother, his father, his brothers, their sons and the husband's other Gotraja sapindas and bandhus in the order in which they inherit his property. And this rule is as stated, page 362, that given in the Mitakshara for the devolution of the property of a male owner dying without issue.

"The Mayukha treating of parabhashika stridhan or stridhan proper of a widow when the marriage is in the Brahma, or other unblamed form, recognises the husband and his kinsmen as the heirs, basing his rule on the same text of

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(1) (1892) 17 Bom. 758.

(2) (1871) 8 Bom. H. C. R. (O. C. J.) 244 (260).

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Yajnavalkiya that is followed in the Mitakshara on the subject, and if there be no husband then the nearest to her in his own family takes it. The heirs being necessarily the sister's son, the husband's sister's son, the husband's brother's son, the brother's son, the son-in-law, and the husband's younger brother in succession. But the point of bifurcation where the Mitakshara and Mayukha separate appears to be a point (below the widow in the series of successive heirs) at which question arises as to the order of succession among the husband's kinsmen.

"In *Gojabai v. Shahajirao Maloji Raje Bhosle*⁽¹⁾, the wife is spoken of as having been born again in the husband's family, so that she having become half the body of her husband, the son of a man by one of his wives is the son of all his wives, and it is for this reason (pages 120, 121) that the stepson is treated, not as the husband's sapinda but as an actual son of a widow whose stridhan is in question. It is not as a sapinda, but as her own offspring that he takes precedence, and is the sapinda of his step-mother who is therefore not to be regarded as childless. It is thus that he is regarded as coming in before the husband himself, owing to the absolute identity of the widow with her husband. This identity of the widow with her husband appears to have been the ground of decision in the case of *Gojabai*, and is the reason why the stepson in that case was held to come in even before the co-widow who opposed his claims as he would apparently have done even before the husband. But when there are no children and the husband is next entitled, the widow of the husband being identified with his as half of his body, seems equally entitled to precedence before the question can arise as to who are the nearest heirs in default of the husband. The husband's kin are, I think, in view of this decision by which I am bound, excluded by the husband himself as represented by the co widow who survived him. This seems to be in accordance with the passage in Mr. Justice Telang's judgment, in which he observes that 'according to the view of some writers the stepson or step-grandson comes in next after the offspring of the woman herself, and before her husband; and that according to the view of others he would come in after the husband, but before his other wives and such other wives' daughters, and *of course*, before other more distant heirs, including the brother's son.'

"The remarks that follow this passage indicate that it is the recognised identity of the wife with her husband that entitle a co-widow's children and a co-widow herself, to take precedence respectively as sapindas of the wife herself, or as representing the husband himself, before resort is had to the husband's sapindas at all. For the above reasons I think the plaintiff is entitled to the relief sought."

From this decision in favour of the plaintiff an appeal was brought which came before Sir Lawrence Jenkins, C. J., and Russell, J., who delivered separate judgments and concurred in

(1) (1892) 17 Bom. 114.

allowing the appeal. The material portions of their judgments were as follows :—

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JENKINS, C. J. :—"The first point is : What interest was taken by Bachubai under the deed of November 1892 ? Mr. Justice Batty held that she took an unlimited interest, but before us both sides have abandoned that view, and it is conceded that she took a limited interest and that her legal heirs took as purchasers. How then are these legal heirs to be ascertained ? By reference to what class of stridhan is their identity to be fixed ? For the descent of stridhan varies with its quality.

"Before us for the first time it has been argued that the legal heir of Bachubai must be determined by reference to the peculiar course of descent of the type of stridhan called Sulka : and this view has been supported before us by a very able argument advanced by Mr. Setlur. But there are many difficulties in the way of accepting this contention. In the first place the devolution of Sulka does not correspond with the course of succession delineated in the deed of the 24th November 1892. In the next place the interest of Bachubai was not (as Sulka is) hereditary ; she took merely a limited interest, and her legal heirs do not take as such, but because they fall within the description of the donees under the terms of the deed. Then, again, even if it could be said that the limited interest taken by Bachubai under the deed was a modernised form of Sulka, it still would be a question whether the heirs to take under the gift should be ascertained by reference to that form of stridhan. The quality of the subject matter does not necessarily affect the meaning of the word 'heirs,' and in illustration of this I may refer to *Garland v. Beverley* (1) where it was held that in a gift of gavel-kind land to the right heir of a person, it was the right heir according to common law and not in reference to the descent of gavel-kind that took under the gift. So here it is at least an arguable point, even if Bachubai's limited interest could be regarded as Sulka, whether the effect of the gift to her heirs is or is not to be determined by reference to the exceptional course of descent peculiar to that particular class of stridhan. It would be undesirable to dispose of this appeal, on a point involving so much of doubt, which might have been cleared by evidence had it been raised at an earlier stage.

"The possibilities in this direction are exemplified by Sir Charles Sargent's decision in the P. J. for 1893 (2). Therefore I prefer to rest my opinion on the hypothesis (which I will assume for the purpose of this case) that the legal heirs indicated are those who would be entitled to Bachubai's ordinary stridhan. Now let me test the case in the first instance with reference to the descent of technical stridhan. Admittedly this case is governed by the Mayukha, which differs from the Mitakshara in its treatment of the descent of stridhan in that it imports the rule of devolution derived from the text of Brihaspati. This

(1) (1878) 9 Ch. D. 213.

(2) *Chunilal v. Ichchand* (1893) P. J., p. 82.

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rule is not introduced absolutely, but with the qualification that it comes into effect on failure of the husband.

"In the course of his judgment Mr. Justice Batty refers to this rule, and in reference to it says: 'The point of bifurcation where the Mitakshara and Mayukha separate appears to be a point (below the widow in the series of successive heirs) at which question arises as to the order of succession among the husband's kinsmen.' From the succeeding passage of the judgment it would appear that the position there ascribed to the widow depends upon her identification with her husband in the sense there indicated. But I am aware of no passage in the Mayukha that can be taken as a warrant for this identification, or for the conclusion that when Nilkantha uses the word 'husband' as he does in reference to the passage of Brihaspati, he includes in it the wife. Mr. Justice Batty, in support of this view and as authority for it, relies on the judgment of Mr. Justice Telang in the case of *Gojabai v. Shahajirao Maloji Raje Bhosle*,⁽¹⁾ but that case turned upon the Mitakshara, and at pages 122 and 123 Mr. Justice Telang points this out. He there deals specifically with Brihaspati's text, and no doubt subjects it to a certain amount of criticism; he suggests a want of harmony between the rule deduced by Nilkantha from Yajnavalkya and the enumeration of heirs in Brihaspati's text, and contends that some of those named in the text would not answer the description of being nearest in the husband's family. But this criticism appears to me to lose sight of the fiction on which the text is based; this is how the passage runs in the Mayukha (*reads* Mandlik, p. 98, 'on failure of the husband,' to 'the daughter's son'). This involves the consequence that the sister's son, the husband's sister's son, the husband's brother's son, the brother's son, the son-in-law, and the husband's younger brother are equal to sons.

"They obviously are not sons in fact, but a fiction is here created whereby they stand in the position of sons, and were the facts in accordance with the fiction (as must be assumed) then there would be no inconsistency and no want of harmony.

"It will be noticed that the fiction only arises on failure of issue and of the husband, but in that I can find nothing that saves the right (if any) of the rival widow against these fictional heirs. At first sight the fiction no doubt appears capricious and unreasonable, but it would appear to be not without foundation. An interesting light is thrown on this subject by Mr. Golap Chunder Sarkar in his work on Hindu Law, pages 328, 329 where he says (*reads*). As far as I can learn what he there depicts presents a substantially accurate representation of relations in Bombay.

"The conclusion then to which I come is that, as at Bachubai's death she left surviving her a younger brother and a nephew of her husband, her rival widow cannot claim to have been her heir. Therefore I think the decree under appeal should be reversed and the suit dismissed."

(1) (1892) 17 Bom. 114.

RUSSELL, J. (after referring to the terms of the deed of 24th November 1892, continued) :—

"It appears to me to be clear that as between himself and his heirs and Bachubai the settler intended that she should be the owner of the property in question subject to the provisions in the indenture contained, and that at all events in the event of the marriage being performed he and his heirs should have no claim to the property.

"This being so the next question to consider is by what law is the indenture to be construed. It is in the English language, was evidently drawn up as it was attested, by an attorney, and therefore to ascertain the meaning of the words used you must apply the principles of English law. 'The meaning and effect of every contract depends upon the law by which the parties intended it to be governed, *i. e.*, the proper law, which means the law or laws by which the parties to a contract intended or may fairly be presumed to have intended the contract to be governed.' This general principle applies both to the interpretation or explanation of a contract and to the obligation of a contract, *i. e.*, the rights and obligations of the parties under it. See Dicey's Conflict of Laws, pp. 540, 564.

"What then according to English law and in the events which have happened is the effect of the said indenture ?

"In my opinion it is that in the event of her having no issue, or not exercising the power of appointment Bachubai should have a limited interest in the property, *i. e.*, for her life, subject to which it should devolve upon 'her heirs,' using that word without reference to the nature of the property, on the authority of the case *Garland v. Beverley*⁽¹⁾ cited by the learned C. J. in his judgment. It was conceded on both sides that the word heirs was a word of purchase and not of limitation. Applying the words of Lindley, L. J., in *Evans v. Evans*,⁽²⁾ her heirs here 'are *personae designatæ* who are to form a new stock from which the succession in future is to be traced.'

"If this be so the heir of Bachubai, as has been shown in the judgment just pronounced, is to be sought for elsewhere than in the plaintiff, and her case accordingly must fail.

"The appeal must therefore be allowed."

On this appeal—

Cohen, K. C., and *DeGrayther* for the appellant contended that by the Hindu law of the Bombay school applicable to *stridhan* the appellant was entitled to succeed, on the death of Bachubai, to the property in suit. The law which governed the case was that prevailing generally in Western India, namely, the Mitakshara, except where it differed from the Vyavahara Mayukha. Reference was made to *Collector of Madura v. Moottoo Ramalinga*

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(1) (1878) 9 Ch. D. 213,

(2) [1892] 2 Ch. 173 at p. 184.

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Sathupathy⁽¹⁾; *Lallubhai Bapubhai v. Mankuvarbai*⁽²⁾; and *Krishnaji Vyanktesh v. Pandurang*⁽³⁾. To show that Bachubai took an absolute estate, and not only a life estate, in the property, *Brij Indar Bahadur Singh v. Ranee Janki Koer*⁽⁴⁾ was referred to. As to what the Mitakshara law was on the subject reference was made to the Mitakshara, chapter II, section 11, placita 1, 9, 11 and 25; Stoke's Hindu Law Books 458, 460; the Mitakshara, chapter II, section 1, placita 5 and 6; Stoke's Hindu Law Books 428; Golap Chunder Sarkar's Hindu Law, 34, 283; and to the interpretation put upon those texts in *Mussumat Thakoor Deyhee v. Rai Baluk Ram*⁽⁵⁾; *Gojabai v. Shahajirao Malaji Raje Bhosle*⁽⁶⁾; and *Krishnai v. Shripati*⁽⁷⁾. According to these texts from the Mitakshara, Bachubai having been married by one of the approved forms, the succession to her *stridhan* would go, on failure of her husband, to his nearest sapindas; a wife was a sapinda of her husband; and therefore on failure of the husband, the co-widow, the appellant, was his nearest sapinda and entitled to the property in suit. The Vyavahara Mayukha was said to differ from the Mitakshara on this point, but it was contended that on its true construction it did not do so, but led to the same conclusion as the Mitakshara. The Vyavahara Mayukha interpreted the Mitakshara as meaning not that the husband's nearest kinsmen (sapindas) inherited a woman's property, but the woman's nearest sapindas in the husband's family, and on that interpretation the co-widow being her nearest sapinda in the husband's family was entitled to succeed. Propinquity was the test. Reference was made to Vyavahara Mayukha, chapter IV, section 8, placitum 19; Stoke's Hindu Law Books 89; Vyavahara Mayukha, chapter IV, section 10, placita 27, 28, 30; Stoke's Hindu Law Books 105; *Bachha Jha v. Jugmon Jha*⁽⁸⁾; *Lallubhai Bapubhai v. Mankuvarbai*⁽²⁾ and the same case on appeal *Lulloobhoy Bappoobhoy v. Cassibai*⁽⁹⁾; the Dayabhaga, chapter IV, section 3; Stoke's Hindu

(1) (1868) 12 Moore's I. A. 397 (435).

(2) (1876) 2 Bom. 388 (417).

(3) (1875) 12 Bom. H. C. R. 65 (67).

(4) (1877) L. R. 5 I. A. 1 (14).

(5) (1866) 11 Moore's I. A. 139.

(6) (1892) 17 Bom. 114 (117).

(7) (1905) 30 Bom. 333; 8 Bom. L. R. 12.

(8) (1885) 12 Cal. 343 (351).

(9) (1880) L. R. 7 I. A. 212 (231); 5 Bom. 110 (126).

Law Books 251; Mayne's Hindu Law, 6th edition, page 38 and paragraph 500, page 669; Shama Churn Sarkar's Vyavastha Chandrika, Vol. II, 538, 539; Mitakshara, chapter II, section 3, placitum 5; Stoke's Hindu Law Books 443; *Mohandas v. Krishnabai*⁽¹⁾; Dayakrama Sangraha, chapter II, sections 6, 9 and 26; Stoke's Hindu Law Books 498; Banerjee on Marriage and Stridhan, Tagore Law Lectures for 1878, 375 (2nd edition, 364); West and Buhler's Digest of Hindu Law, 517; *Gojabai v. Shahajirao Maloji Raje Bhosle*⁽²⁾; and *Rahi v. Govinda*⁽³⁾. Brihaspati gives the heirs, but not in the order of their succession. According to the respondents' contention the Mitakshara and the Vyavahara Mayukha were irreconcilable on the point in dispute in this case; the construction put by the appellant on placitum 30 of chapter IV, section 10, of the latter treatise is a construction which renders the two treatises not inconsistent with one another. Under that construction the appellant was entitled to succeed in preference to the respondents. If Bachubai had only a limited estate under the deed of gift there was no valid disposal of the remainder, and in that case the appellant was also entitled to the property in suit.

Jardine, K. C., and *W. C. Bonnerjee*, for the respondent Hunsraj Morarji, contended that according to the Bombay school of Hindu law as expounded in the Vyavahara Mayukha this respondent, as the husband's younger brother, was a preferential heir to the appellant, the co-widow, with respect to the property in suit. It was not denied that Bachubai took an absolute estate, but had it been otherwise, and she had had only a life estate, the bequest would not have been void as to the remainder, for, under the ruling in the case of *Bai Motivahoo v. Bai Mamobai*⁽⁴⁾, it was validated by the power of appointment having been given to Bachubai. It was contended that placitum 28 of the Vyavahara Mayukha, chapter IV, section 10, was general, and that placitum 30 was special and defined the heirs and nearest kinsmen, and superseded placitum 28. The widow came in as sapinda of the husband only under placitum 28. What Telang, J., says contrary

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(1) (1881) 5 Bom. 597.

(3) (1875) 1 Bom. 97 (106).

(2) (1892) 17 E.O. 114 (121, 123).

(4) (1897) L. R. 24 I. A. 93; 21 Bom.

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to this in the case of *Gojabai v. Shahajirao Maloji Raje Bhosle*⁽¹⁾ was merely an *obiter dictum*. Reference was made to *Venkatasubramaniam Chetti v. Thayarammah*⁽²⁾; Golap Chunder Sarkar's Hindu Law 328, 329; 1 Macnaghten's Hindu Law 39; Banerjee on Marriage and Stridhan (Tagore Law Lectures for 1878), 2nd edition, 386; Dayakrama Sangraha, chapter II, section 6; Stoke's Hindu Law Books 498; Dayabhaga, chapter, IV, section 3, placita 32, 33, 39; Stoke's Hindu Law Books 257; Mayne's Hindu Law, 6th edition, page 693, paragraph 529; *Rachava v. Kalingapa*⁽³⁾; *Lulloobhoy Bappoobhoy v. Cassibai*⁽⁴⁾; *Nahalchand Harakchand v. Hemchand*⁽⁵⁾; Mitakshara, chapter II, section 1, "He who has no son, &c."; Stoke's Hindu Law Books 427; *Bachha Jha v. Jugmon Jha*⁽⁶⁾; *Dasharathi Kundu v. Bipin Behari Kundu*⁽⁷⁾; and *Hunsraj v. Bai Moghibai*⁽⁸⁾. The succession of heirs was not the same as the succession of sapindas, for which was instanced the case of the daughter. The respondents came under "sister's sons and the rest." Under the Vyavahara Mayukha, or any other school of Hindu law, a widow could not be identified with her husband, as regarded inheritance, except in respect of property belonging to him at the time of his death.

G. E. A. Ross, for the respondent Bai Monghibai, made a similar contention to that for the respondent Hansraj Moorarji and submitted that under the law set forth in the Vyavahara Mayukha she was, through her husband, who was a nephew of Koreji Haridass, entitled to succeed to Bachubai's estate in preference to a co-widow. He cited *Venkatasubramaniam Chetti v. Thayarammah*⁽²⁾; and *Hunsraj v. Bai Moghibai*⁽⁸⁾.

Cohen, K. C., replied citing *Hunsraj v. Bai Moghibai*⁽⁸⁾; *Lulloobhoy Bappoobhoy v. Cassibai*⁽¹⁰⁾; and the case of *Lakshmibai v. Jayram Hari*⁽¹¹⁾ there referred to.

(1) (1892) 17 Bom. 114 (118).

(2) (1898) 21 Mad. 263 (267).

(3) (1892) 16 Bom. 716.

(4) (1880) L. R. 7 I. A. 212; 5 Bom. 110.

(5) (1884) 9 Bom. 31.

(6) (1885) 12 Cal. 343.

(7) (1904) 32 Cal. 261 at p. 262.

(8) (1904) 7 Bom. Law Rep. 622 (627).

(9) (1904) 7 Bom. Law Rep. 622 (630).

(10) (1880) L. R. 7 I. A. 212 (238); 5 Bom. 110 (126).

(11) (1869) 6 Bom. II. C. R. (A. C. J.) 152.

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LORD DAVEY:—The question in this appeal relates to the succession to immoveable property in the Island of Bombay, of which a Hindu lady named Kumari Bachubai died possessed. She was the widow of one Koreji Haridass, who died in February 1898. On the 24th November 1892 Koreji Dass executed an ante-nuptial settlement of the property now in dispute, whereby he conveyed it to Kumari Bachubai, her heirs, executors, administrators, and assigns, for ever, subject to the following conditions :—

“1. If the said Kumari Bachubai shall die before the said intended marriage has been celebrated and completed then the said house, land and premises shall revert to and again become the absolute property of the said Koreji Haridass, his heirs, executors, administrators, and assigns.

2. If the said Kumari Bachubai shall die after the said intended marriage has been celebrated and completed without leaving issue of the said intended marriage who shall succeed to a vested interest in the said house, land and premises then the said house, land and premises shall be dealt with as she may direct or declare by will or deed or failing any will or deed then the same shall vest in her legal heirs according to Hindu law of the Bombay School.”

The marriage was celebrated in February 1898. Kumari Bachubai died on the 9th May 1899 without leaving any issue and without having made any appointment by deed or will. It is not disputed that the persons entitled to succeed to the property as heirs of Kumari Bachubai were the persons entitled to her ordinary stridhan. The rival claimants are the appellant, Bai Kesserbai, who was the surviving co-widow of Koreji Haridass, the respondent Bai Monghibai, who is the widow of Ranchordas Haridass, a brother of Koreji Haridass who survived Kumari Bachubai and died on the 17th June 1902 (it is presumed childless), and the respondent Hunsraj Morarji, who was the son of another brother of Koreji Haridass, who predeceased Kumari Bachubai. The appellant was the plaintiff in the suit, which was commenced on the 4th August 1902, in the High Court of Bombay. Mr. Justice Batty decided that by the Hindu law of the Bombay School the appellant was the next heir to Kumari Bachubai, and entitled to succeed. This decision was reversed on appeal by the Chief Justice and Mr. Justice Russell, and by

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their decree dated the 11th December 1903 the suit was dismissed with costs.

It is stated in the judgment on the appeal that both sides abandoned the view taken by Mr. Justice Batty, that Kumari Bachubai under the deed of gift took an absolute interest in the property, and that it was conceded that she took a limited interest only, and her heirs took as purchasers. Both the learned Judges were also of that opinion, and their judgments are, to a certain extent, based on it. Their Lordships are at a loss to understand on what grounds this opinion was arrived at. They have no doubt whatever that whether the deed is to be construed according to English law, as Mr. Justice Russell thought, or by Indian law, Kumari Bachubai took under it an absolute estate of inheritance.

Questions on the Hindu law of inheritance to property in the Island of Bombay are to be determined in accordance with the Mitakshara, subject to the doctrine to be found in the Mayukha where the latter differs from it. But as laid down by Mr. Justice Telang,⁽¹⁾ "Our general principle should be to construe the Mitakshara and the Mayukha so as to harmonize with one another, wherever and so far as that is reasonably possible." The point now under discussion is whether a co-widow is entitled to succeed to the property of a widow dying without issue in preference to her husband's brother or brother's son. There has been no judicial decision on this question, and their Lordships must decide it on the construction of the texts of Mitakshara and the Mayukha read together, with such assistance as may be afforded by other commentaries (though not recognised as authorities in Bombay) and by modern text books.

If the case rested on the Mitakshara alone their Lordships are of opinion that the appellant would be entitled to succeed. The material texts of the Mitakshara are Chapter II, Section XI, Placita 8, 9, and 11⁽²⁾ :—

"8. A woman's property has been thus described. The author next propounds the distribution of it: 'Her kinsmen take it if she die without issue.'

(1) *Gojabai v. Shahajirao Maloji Raje* (2) Stokes' "Hindu Law Books," pp. 460
Bhosle, (1892) 17 Bom. 114 at page 461.
118.

"9. If a woman die 'without issue,' that is, leaving no progeny the woman's property, as above described, shall be taken by her kinsmen; namely, her husband and the rest, 'as will be [forthwith] explained.

"11. Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, &c. . . . the [whole] property, as before described, belongs in the first place to her husband. On failure of him it goes to his nearest kinsmen [sapindas] allied by funeral oblations. But in the other forms of marriage, called Asura, &c. . . ., the property of a childless woman goes to her parents, that is, to her father and mother."

There can be no reasonable doubt that according to the Mitakshara definition of sapinda husband and wife are sapindas to each other. In the case of *Lallubhai Bapubhai v. Mankuvarbai*⁽¹⁾ Sir Michael Westropp, after quoting a long passage from the Achara Kanda of the Mitakshara, said (at p. 423):—

"This shows that Vijnyanesvara abandoned the doctrine that the right to offer funeral oblations alone constituted *sapinda-ship*, and adopted, in lieu of it, the theory that *sapinda-ship* is based upon community of corporal parties, or, in other words, upon consanguinity, and that he maintained that there is such a community between the wives of collaterals."

The learned Chief Justice then showed that the same theory had been adopted by Nilakantha, the author of the Mayukha, and that the doctrine applied to sapinda relationship, not only in its ceremonial aspect but for purposes of inheritance also. It was accordingly held in that case, which arose in the Island of Bombay, that under the law of the Mitakshara and Mayukha the widow of a deceased first cousin succeeded in her husband's place in preference to a male of a remoter degree. In *West and Bühler*⁽²⁾ it is stated that whether "nearness" in the rule given by the Mitakshara for succession to childless widows' property should be determined in accordance with the succession to the property of a male, or whether it means nearest by relationship, the co-widow has the first right of succession, but in the latter case concurrently with other kinsmen in the same degree. But they say:—

(1) (1876) 2 Bom. 388.

(2) "Digest of the Hindu Law of Inheritance," (3rd Edn.) page 518.

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"The identity of the wife with her husband being accepted as a leading principle of the Mitakshara, the rule seems on the whole most consonant to it, whereby precedence, in heritable relation to him, gives a like precedence, and order of succession in relation to his widow."

And they add :—

"Such appears to be the rule too which custom has preferred in this part of India."

In accordance with these views it has been recently decided in a case from the Sātara district where the Mitakshara is the governing authority that a co-widow succeeds to a childless widow's stridhan in preference to her husband's brother's son (*Krishnai v. Shripati*⁽¹⁾).

The grounds upon which it is said that the rule thus deducible from the Mitakshara is altered or superseded by the Mayukha are to be found in Chapter IV, section X⁽²⁾ of that treatise, Placita 28 and 30, which are as follows :—

"28. The property of a childless woman married in the form denominated Brahma, or in any of the other four [unblamed modes of marriage] goes to her husband ; but if she leave progeny, it will go to her daughters ; and in other forms of marriage [as the Asura, &c.,] it goes to her father and mother on failure of her own issue.' [In the one case] if there be no husband, then the nearest to her, in his [tat] own family takes it ; and [in the other case], if her father do not exist, the nearest to her in [her] father's family succeeds, [for the law that :] 'To the nearest sapinda, the inheritance next belongs,' as declared by Manu denotes that the right of inheriting her wealth is derived even from nearness of kin to the deceased [female] under discussion—and, though the Mitakshara holds, 'that on failure of the husband, it goes to his [tat] nearest kinsmen [sapinda] allied by funeral oblations' ; and 'on failure of the father, then to his [tat] nearest sapindas' ; yet, from the context it may be demonstrated, that her nearest relations are his nearest relations ; and [the pronoun *tat* being used in the common gender,] it allows of our expounding the passage 'those nearest to him, through her, in his own family' : for the expressions are of similar import."

"30. On failure of the husband of a deceased woman, if married according to the Brahma or other [four] forms ; or of her parents, if married according to the Asura or other two forms, the heirs to the woman's property, as expounded above, are thus pointed out by Brihaspati : 'The mother's sister ; the maternal uncle's wife ; the paternal uncle's wife ; the father's sister ; the mother-in-law, and the wife of an elder brother, are pronounced similar to

(1) (1905) 30 Bom, 333 : 8 Bom. L. R. 12.

(2) Stokes, *op cit.*, p. 105.

mothers. If they leave no son born in lawful wedlock, nor daughter's son, nor his son, then the sister's son, and the rest shall take their property.' Here must be understood, 'on failure both of the daughter, and also of her daughter,' because only on failure of them does the right of inheritance pertain to the son born in wedlock, or to the daughter's son."

The text of Brihaspati, quoted above, is thus paraphrased by Mr. Justice Banerjee in his Tagore Lectures (1878)⁽¹⁾:—

"To a male, the females related as the sister of his mother, the wife of his maternal or of his paternal uncle, the sister of his father, the mother of his wife, and the wife of his elder brother are like his mother; and so to a female the males related in the *reciprocal* way as her sister's son, her husband's sister's son, her husband's brother's son, her brother's son, her daughter's husband, and her husband's younger brother are like her son. And these last-mentioned relations of a female being like her sons, inherit her *stridhana* if she leave no male issue, nor son of a daughter, nor a daughter."

You have, therefore, the following list of relations to the childless widow and deceased proprietress of the stridhan who are said to be like her sons, and have been called by some text writers secondary sons:—

- (1) Sister's son.
- (2) Husband's sister's son.
- (3) Husband's brother's son.
- (4) Brother's son.
- (5) Son-in-law, or daughter's husband.
- (6) Husband's younger brother.

The chief difficulty about the text of Brihaspati is that we do not know the context in which it occurs. It appears to give promiscuously the sapindas of the husband, and those of the father without noticing the distinction in the devolution of the property depending upon the form of marriage of the deceased widow. No intelligible principle has been discovered for the order in which they are enumerated. It is at variance with the settled and universally recognised principles of the Hindu law of inheritance, and the enumeration is obviously not exhaustive. Moreover, it is so expressed as to bring in the secondary sons immediately after the issue of the widow, for the words "if they leave no son," &c., are construed to refer to childless widows, and the description of the issue, upon failure of whom Brihaspati's secondary sons are to take, is neither exhaustive nor

(1) Banerjee on Marriage and Stridhan (2nd Edn.), pp. 387, 388.

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accurately descriptive of the order in which such issue would be entitled to succeed. The important question, however, is, how the author of the *Mayukha* understood the quotation. In his comment at the end of Placitum 30 he partially supplies the gaps left in the enumeration of issue, but not fully. If the "son born in lawful wedlock," means or includes a son of a rival wife (as is said in the *Daya Bhaga*) he would take only after the husband and (if the order of succession be based on propinquity) concurrently with the rival wife (see *West and Bühler*, Digest, p. 518, already quoted).

Nilakantha, however, clearly intends to bring in Brihaspati's series of secondary sons on failure of the husband or father, but whether immediately on that event or in what order is another question. Three constructions have been offered on these points. First, it was argued before their Lordships that the words "on failure of the husband of a deceased woman" should be read as meaning "on failure of the husband and his line of sapindas," succeeding in accordance with Placitum 28. Secondly, that Brihaspati's series of secondary sons comes in between the husband and his nearest sapindas and in the order in which they are mentioned. Thirdly, that a distributive construction should be given to Brihaspati's text applying the husband's relatives named to the case of a woman married in one of the approved forms, and the father's relatives to the other case only, and the text should be read as illustrative only, and neither exhaustive nor intended to prescribe the order in which the enumerated heirs take.

It does not appear to their Lordships possible to adopt the first of these constructions without doing unnecessary violence to the language and context. The words in Placitum 30 are: "On failure of the husband..... the heirs to the woman's property as expounded above are thus pointed out by Brihaspati." The quotation from Brihaspati, therefore, was intended to be used in the *Mayukha* as explanatory or expository of the class of heirs already pointed out in Placitum 28, and not as substitutive for them or as superseding them. Again, some of the husband's sapindas are included in Brihaspati's series, which seems decisive against this construction.

What may be described as a modified form of this construction is that adopted by Mr. Justice Batty. That learned Judge held that the point of bifurcation where the Mitakshara and Mayukha separate appears to be a point below the widow in the series of successive heirs, and that it is the recognised identity of the wife with her husband that entitles a co-widow's children and a co-widow herself to take precedence as sapindas to the wife herself or as representing the husband himself before resort is had to the husband's sapindas at all. The Chief Justice says that he is aware of no passage in the Mayukha that can be taken as a warrant for the identification of the wife with her husband. It seems, however, difficult to maintain this position in face of the learned judgments of Sir Michael Westropp and Mr. Justice West in the case of *Lallubhai Bapubhai v. Mankurvarbai* ⁽¹⁾ and the judgment of Mr. Justice Telang in *Gojabai v. Shakhajirao Maloji Raje Bhosle* ⁽²⁾.

According to the second construction [the text of Brihaspati is read in what is no doubt its more obvious and literal sense apart from the context. It is that adopted by the Chief Justice and supported by the respondents in the present appeal, and it has considerable authority in its favour, including the Daya Bhaga, the Viramitrodaya, and Vyavastha Chandrika, and amongst modern text writers, West and Buhler, Mr. Justice Banerjee, and Mr. G. Sarkar. In the Daya Bhaga, however, it is said that if the order of succession were according to Brihaspati's text it would be contrary to the opinion and practice of venerable persons, and that the text is propounded "not as declaratory of the order of inheritance but of the strength of the fact," whatever those words may mean. Notwithstanding the weight of the authority in its favour, their Lordships cannot bring themselves to think that the construction contended for by the respondents is the one which they ought to adopt. So far from construing the Mitakshara and the Mayukha so as to harmonize with one another so far as that is reasonably possible, the respondents place them in direct conflict, and not only so, but the Mayukha is also divided against itself. Placitum 30 deals as well with the

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(1) (1876) 2 Bom. 388.

(2) (1892) 17 Bom. 114.

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case of a widow married in one of the approved forms as with that of a widow married in one of the lower forms, and is expressed to be expository of the rule laid down in Placitum 28. But some of the enumerated heirs are not blood relations of the husband at all, or members of his family, and others of them are not blood relations of the widow's father, or members of his family. Again, those who are nearest (both as regards degree of propinquity and in order of inheritance) are postponed in favour of those who are more remote in contradiction alike of the Mitakshara and Placitum 28 of the Mayukha.

The case of *Gojabai v. Shahajirao Maloji Raje Dhosle*⁽¹⁾ related to the succession to the stridhan of a childless Hindu widow married in one of the approved forms, who left her surviving (1) a co-widow, (2) the grandson of another co-widow, (3) a son of her husband's brother. The case fell to be decided in accordance with the Mitakshara, and the decision was in favour of the step-grandson, whether he was to be described as the husband's nearest sapinda or the wife's nearest sapinda in his family. But the texts of the Mayukha now under consideration had been relied on in argument, and the judgment of Mr. Justice Telang contains a valuable disquisition on that commentary. "Constructing the Mitakshara in the sense which Nilakantha places upon its language" (Pl. 28), the learned Judge says:—

"The wife having, by her marriage, been 'born again in the husband's family,' and having become 'half the body of the husband,' the sapindas of the husband necessarily become her sapindas, and their degrees of propinquity to the husband and wife must be held to be identical, unless some specific reason to the contrary is shown."

The judgment of the learned Judge also contains the following passages:—

"In truth, even the rule which Nilakantha himself deduces from Yajnavalkya's general text is not in harmony with the enumeration of heirs contained in the text of Brihaspati now under consideration. And yet the Mayukha does not say how the two are to be made to stand together. The learned authors of the Digest have placed the heirs enumerated by Brihaspati after the husband, and before the woman's sapindas in her husband's family. This certainly appears to be warranted by the express words of the Mayukha contained in Placitum 30. Yet it is not quite reconcileable with the previous declaration in Placitum 28

(1) (1892) 17 Bom. 114.

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that 'if there be no husband, then the nearest to her in his family takes' the woman's property. It is quite plain that some of the persons referred to in Brihaspati's text do not answer to this description at all; while of those that do, the husband's brother's son is not obviously nearer than the husband's younger brother, and yet according to Brihaspati's text the former would stand before the latter. It cannot, therefore, be assumed to be *quite* clear, according to the view of the Mayukha, that Brihaspati's list states the true order of succession as between the heirs enumerated, or that all those heirs take precedence over the ones included under the designation 'nearest to her in her husband's family'."

And again,—

'But Mr. Bhandarkar argued that the heirs specifically named in Brihaspati's text ought to be given precedence over those who come in under the general designation, each group of them taking precedence in the class (*viz.*, that of husband's kinsmen or parent's kinsmen), to which it belonged. There is, however, no authority for this view. In West and Buhler's Digest the precedence is given to the whole of the enumerated heirs, and the ground for such precedence has already been stated. If they are not treated as one class, there is apparently no other ground for the preference than is indicated by the principle mentioned in the Vyavahara Mayukha, Chapter IV, section VIII, Placitum 13. But that principle, as there expressed, appears to be intended to apply only where there is a 'compact series.' This Court in *Mohandas v. Krishnabai*⁽¹⁾ declined to apply it in the case of *bandhus*, so as to give to the *bandhus* expressly named a preference over those who come in under the general definition. I think this is the authority which would be more applicable in the matter before us, and no such preference of the designated persons can, therefore, be allowed in this case."

The case of *Bachha Jha v. Jugmon Jha*⁽²⁾ on the other hand, was a judicial decision on the text of Brihaspati now under consideration. It was there held that the stridhan property of a widow governed by the Mithila law and married in one of the approved forms, goes to her husband's brother's son in preference to her sister's son. It appears from the judgment of the Court that the Vakil for the appellant had relied on that portion of Ratnakara which treats of stridhan. The learned Judges observe that that book is no doubt one of considerable authority in the Mithila School, and if the matter were clear upon what Ratnakara says on the subject, they should, perhaps, have no difficulty in deciding the matter. The author of Ratnakara (it appears) in the passage relied on cited the text of Brihaspati now under consideration, with the following commentary, *viz.*,

(1) (1881) 5 Bom. 597.

(2) (1885) 12 Cal. 348.

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"The meaning is that in default of the son and the rest, the sister's son, &c., shall take the property of their mother's sister and others." The learned Judges refer to other commentaries in which the same text of Brihaspati is cited, and they quote an opinion attributed to Mr. Colebrooke, in which it is stated, that by some commentators a distributive construction of the text is adopted, the three relations in Brihaspati's enumerated heirs who are so through the husband taking the property in the one case, and the three who are so through the father taking the property in the other case. And after discussing the placita in Mayukha dealing with the subject they say they are inclined to think that what the author meant to lay down was that the succession of the heirs mentioned in Brihaspati's text is to be taken to be subject to the rule of law laid down by him in accordance with the Mitakshara, as suggested in "Shama Churn's Vyavastha Chandrika," Vol. II., p. 539. Ultimately, the case was decided in accordance with the Mitakshara, on the ground that the meaning and effect of the text of Brihaspati quoted by Ratnakara was too ambiguous to control the plain meaning of that work.

The Chief Justice answers the argument that some of the persons enumerated in Brihaspati's text as heirs do not answer the description of being nearest in the husband's family by saying that this criticism loses sight of the fiction on which the text is based, which, he says, involves the consequence that the persons enumerated are equal to sons. With great respect, this is not what is said, or apparently intended, by the text. They do not take concurrently with sons, and no text writer has even suggested that they take concurrently with each other, as they would do if they were all equal to sons, or to be treated as sons. The analogy appears to their Lordships to be purely fanciful and not based on any discoverable principle. Nor is it in accordance with the fact. The kinship of the husband's brother's son is not derived through the wife of the husband's brother, but through the husband's brother himself.

It is apparent from the judgments above quoted that the learned Judges did not treat the application of Brihaspati's text, or the meaning of the author of the Mayukha in quoting it, as

settled by authority, either as regards the place in the succession of the enumerated heirs or the order in which they are to take. It would perhaps be sufficient for their Lordships to say, in accordance with a well settled principle of construction, that the unambiguous direction in Placitum 28 of the Mayukha is not controlled by a subsequent text the language of which is of such uncertain meaning as that contained in Placitum 30 of the same work. But following out the line of thought suggested in the judgments quoted above their Lordships think that a construction may be put on the language of Placitum 30 of the Mayukha which will bring it into harmony with the Mitakshara, and also reconcile it with the previous placitum of the Mayukha itself. They are of opinion that the text of Brihaspati should be read distributively as regards the property of women married according to one of the approved forms, and the property of those married in one of the lower forms. In the one case, those of the heirs enumerated by Brihaspati who are blood relations of the husband, *viz.*, the husband's sister's son, the husband's brother's son, and the husband's brother, will succeed to the woman's property, and in the other case the relations of the father will succeed. In the diversity of opinion amongst the text writers whether Brihaspati's series of heirs take in the order in which they are enumerated, their Lordships think that the better opinion is that the order of succession is not indicated. There is no apparent reason for preferring the husband's sister's son to the husband's brother's son, or both, to the husband's brother. And their Lordships agree with the learned editor of the Vyavastha Chandrika that the solution is to be found by reference to Placitum 28, in which the heirs are described as the nearest sapindas of the wife in the husband's family, or the nearest to her in her father's family, as the case may be. The list is not exhaustive, and neither a co-widow, nor any other sapinda of the husband, is excluded. The words "and the rest" therefore must mean, or include, the other relations of the husband or father. But if the text does not prescribe any new order of succession, and the co-widow is not excluded, it follows that she must take in her right place, or (in other words) the appellant is entitled in preference to the respondents. Their Lordships thus arrive at

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the same conclusion as Mr. Justice Batty, though by a somewhat different road.

If there were any construction of the text laid down by authority binding on the Courts of Bombay, or if there were any established practice or usage in the application of the text, their Lordships would follow it without hesitation, though it might not commend itself to their judgment. But no such authority has been referred to, and there is no evidence of any such practice or usage. Their Lordships therefore are at liberty, and are bound, to act on the opinion which they have formed, and will humbly advise His Majesty that the appeal be allowed, and that the order of the High Court of Bombay (Appeal side), dated the 11th December, 1903, be discharged, and the decree of Mr. Justice Batty, dated the 21st February, 1903, be restored, and that the respondents do pay to the appellant the costs of their appeal in the High Court. They will also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *Messrs. Ashurst, Morris, Crisp & Co.*

Solicitors for the respondent Hunsraj Morarji: *Messrs. Payne and Lattey.*

Solicitors for the respondent Bai Monghibai: *Messrs. Rawle, Johnstone & Co.*

J. v. W.

REFERENCE FROM THE COURT OF SMALL CAUSES.

*Before Sir Laurence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batty.*

NUSSERWANJI COWASJI SHROFF (PLAINTIFF) v. LAXMAN
BHIKAJI (DEFENDANT).*

*Hindu Law—Interest—Damdapat—Interest accrued due not affected
by the rule of damdupat.*

Plaintiff advanced Rs. 714 to the defendant. The whole of this sum was repaid by the defendant. The plaintiff then sued to recover Rs. 33-9-2, being the amount of interest over the amount from the date of the loan to the date of

* Small Cause Court reference in Suit No. 16596 of 1905.

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its repayment. The defendant raised the plea of *damdupat*, alleging that no sum was due as principal at the date of suit, so none could be recovered by way of interest.

Held, that the claim should be allowed; since the rule of *damdupat* had no application to right that has already accrued.

The rule of *damdupat* does not divest rights that have accrued; it merely limits accruing rights.

A suit against a Hindu debtor for interest actually and legally accrued is not barred merely because the principal sum lent has been paid off.

THIS was a case referred to the High Court by R. M. Patel, Chief Judge of the Bombay Court of Small Causes, and by A. K. Donald, Second Judge of the same Court, under section 69 of the Presidency Small Cause Court Act, XV of 1882.

The reference was as follows :—

"I beg respectfully to submit the following question and invite their Lordships' opinion on it.

"Whether a suit can lie against a Hindu debtor for arrears of interest only, when the whole of the principal sum lent has been paid off, and the creditor has admittedly appropriated the sums repaid towards the payment of the principal only?

"In the above suit the creditor had advanced Rs. 714 and the whole sum was repaid to a pie. The suit was to recover Rs. 33-9-2, being amount of interest in arrears at one and half per cent. per month, or 18 per cent. per annum. Nothing out of the sums repaid was appropriated by the plaintiff for interest. For the defence it was argued that under the Hindu rule of *damdupat* 'no greater arrear of interest can be recovered at any one time than what will amount to the principal sum' (*Dhondu v. Narayan*, 1 B. H. C. R. 47) and that the expression 'principal sum' meant 'the balance of the principal lent, and not the original amount advanced' (*Dagdusa v. Ramchandra*, 20 Bom. 611); and as the balance of the principal lent was nil, the interest claimed could not be allowed.

"The learned Second Judge gave a decree for the sum of Rs. 33-9-2 for interest. The defendant applied to the Full Court and a rule was granted. At the hearing the learned Second Judge adhered to his judgment, and thought the rule should be dismissed. I however considered that the question before the Court was concluded by authority, and the Full Court was bound to act upon the judgment of Ranade, J., in *Dagdusa v. Ramchandra*, 20 Bom. 611. I was therefore of opinion that the rule should be made absolute, and the interest claim dismissed.

"I may say that for a number of years this Court has uniformly followed the ruling as expounded in *Dhondu v. Narayan* and explained in *Dagdusa v. Ramchandra*. The amount of interest claimed in a suit where the defendant

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was a Hindu has not been allowed to exceed the balance of the principal sued for, it followed that where the balance of principal was nil, no interest could be allowed. * * * *

"The learned Second Judge seemed to think from the opening sentence of the judgment at page 613 of 20 Bom. that Mr. Justice Ranade limited or restricted the application of the rule of *damdupat* 'to loans at interest when the payments made have satisfied in part the principal claim along with interest.' The opening sentence however refers only, it is submitted, to the facts of the case then before the Court in Appeal. If otherwise, it would lead to an awkward result, that where the plaintiff honestly admitted there were Rs. 5 or Rs. 1, as the case may be, due to him for balance of principal he would get only Rs. 5 or Rs. 1 for interest, but if he said that there was no balance due for principal he would get the whole amount of interest setting aside the *damdupat* rule.

"The learned Judge also thought it would be inequitable to allow defendant to deprive plaintiff of recovering interest at the commercial rate. But 18 per cent. interest has never been the recognised commercial interest in the City."

This reference came up for disposal before Jenkins, C. J., and Batty, J.

There was no appearance on either side.

JENKINS, C. J. :—The rule of *damdupat* does not (in my opinion) divest rights that have accrued; it merely limits accruing rights.

If therefore the interest claimed was not at its accrual barred by the rule of *damdupat*, but actually became a debt due to the plaintiff, the subsequent payment of the principal sum in respect of which it accrued would not cancel or avoid the debt of interest.

To hold otherwise would lead to the result that if A owed B Rs. 1,000 for principal and Rs. 1,000 for interest A by paying B Rs. 1,000 and intimating that the payment was to be applied to the discharge of the principal, would deprive his creditor of his right to the Rs. 1,000 due to him in respect of interest.

Reliance has been placed in the reference on the decision in *Dagdusa v. Ramchandra*⁽¹⁾ but in the principle there laid down there is nothing opposed to the view I have expressed.

Mr. Justice Jardine, it is true, says "I have had the advantage of seeing the judgment written by my brother Ranade, and I concur in his impression that the Courts have been in the habit of interpreting the word 'principal' as meaning the balance of

(1) (1895) 20 Bom. 611.

principal unpaid at the time of suit." But it is clear that Jardine, J., did not intend to lay down anything at variance with the principle adopted by Ranade, J.

Then what is that principle? It is, I think, to be found in that part of his judgment where, dealing with Mr. Khare's reference to Kulluka's comment, he says "There is nothing in these words to justify the contention that it is the original principal, and not the principal due when the arrears of interest accrue."

Obviously the learned Judge takes the limit imposed by the rule of *damdupat* to be the principal due *when the arrears of interest accrued*, and not as Jardine, J., supposed "the balance of principal unpaid at the time of suit." The variation introduced by Jardine, J., was immaterial for the purposes of the case then before the Court, as the principal sum on which the arrears of interest accrued still remained unpaid and undischarged at the date of the suit.

I would, therefore, answer the question submitted for our opinion by saying that a suit against a Hindu debtor for interest actually and legally accrued is not barred merely because the principal sum lent has been paid off.

R. R.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Russell.*

BAI DAHI (ORIGINAL APPLICANT), APPELLANT, *v* HARGOVANDAS
KUBERDAS (ORIGINAL OPPONENT), RESPONDENT.*

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Civil Procedure Code (Act XIV of 1882), section 198—Judgment to be pronounced in open Court or on some future day—Notice to the parties or their pleaders or recognized agents—Practice in the Mofussil Courts strongly disapproved of.

Section 198 of the Civil Procedure Code (Act XIV of 1882) provides that "the Court, after evidence has been duly taken and the parties have been duly heard either in person or by their respective pleaders or recognized agents,

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shall pronounce judgment in open Court either at once or on some future day, of which due notice shall be given to the parties or their pleaders."

Failure to observe the provisions of section 198 of the Civil Procedure Code (Act XIV of 1882) and the not uncommon practice in the Mofussil Courts to omit to pronounce judgment in open Court, strongly disapproved of.

APPEAL against the decision of H. L. Hervey, District Judge of Surat, rejecting an application for Letters of Administration.

The appellant Bai Dahi applied for Letters of Administration to the estate of her deceased husband Tribhuvandas Gulabchand.

The opponents Hargovandas Kuberdas and Lallubhai Brijlal opposed the application and set up a will of the deceased appointing them executors.

The District Judge held that the will relied on by the opponents was proved and dismissed Bai Dahi's application on the 6th June, 1904.

Bai Dahi, thereupon, appealed urging *inter alia* that the Judge erred in not delivering judgment in open Court which greatly prejudiced her as the parties had, among other things, effected a settlement during the summer vacation which fact was to be brought to the notice of the Judge on the opening of the Court. In consequence of the said contention a report was called for from the Judge and he (Mr. Dayaram Gidumal, successor of Mr. H. L. Hervey), on a consideration of all the circumstances, reported that the judgment was not pronounced in open Court on the 6th June, 1904.

Hiralal and *M. D. Nanavati* appeared for the appellant (applicant).

L. A. Shah appeared for the respondent (opponent).

JENKINS, C. J. :—This appeal arises out of an application for Letters of Administration made by the appellant Bai Dahi, widow of Tribhowandas, to the estate of her husband.

The application has been dismissed by the District Court.

It is from that decree of dismissal that this appeal has been presented.

The first objection taken to the decree is that it follows on a judgment which was not pronounced as required by the law.

Section 198 of the Code of Civil Procedure provides that "the Court, after the evidence has been duly taken, and the parties

have been heard either in person or by their respective pleaders or recognized agents, shall pronounce judgment in open Court either at once or on some future day, of which due notice shall be given to the parties or their pleaders."

It is said that the judgment in this case was not pronounced in open Court, and this is confirmed by the report for which we have called.

We strongly disapprove of any failure to observe the provisions of section 198 of the Code; and we desire to express our disapproval, because it has been represented to us that it is not an uncommon practice in the mofussil Courts to omit to pronounce judgment in open Court.

Apart from the fact that it is in direct opposition to an express provision of the law, the practice is highly inconvenient, and deprives the Court and the litigants of a valuable safe-guard against error.

It must often happen that some slip or error occurs in the course of a judgment which the advocate or pleader engaged in the case is able to point out to the Judge with the result that it can be rectified at once and the parties thus saved the expense, trouble and delay which would be involved in seeking a rectification by review or appeal. If the practice exists, we trust it will cease and that a judgment will always be pronounced, as the law requires, in open Court, and that pleaders will attend when judgment is pronounced, and assist the Court by pointing out any error that may occur.

G. B. R.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Russell.*

MADHAVJI BHANJI (ORIGINAL DEFENDANT 2), APPELLANT, v.
RAMNATH DADODA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*
*Specific Relief Act (I of 1877), section 31—Sale—Suit for specific
performance—Rectification—Mutual mistake—Clear proof.*

To establish a right to rectification of a document it is necessary to show that there has been either fraud or mutual mistake. Under the terms of section

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31 of the Specific Relief Act (I of 1877), it is necessary that the Court should find it clearly proved that there was such mistake.

"A person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought."

Fowler v. Fowler⁽¹⁾ followed and applied.

SECOND appeal from the decision of H. S. Phadnis, Acting District Judge of Thana, reversing the decree of N. V. Atre, First Class Subordinate Judge.

The plaintiffs sued for specific performance of an agreement for sale and for possession of the property the subject of the contract. The property originally belonged to one Sundar Ramchandra. It was sold at a Court sale held on the 23rd and 24th December, 1901, and purchased by the defendants. The property which was sold comprised varkas land, Survey No. 8, and a house. On the 21st November following the defendants agreed to sell the property to the plaintiffs for Rs. 1,599 and executed a Satekhat (deed of agreement) to that effect and took from the plaintiffs Rs. 201 in advance to cover the charges of the conveyance which, it had been agreed, were to be borne by the plaintiffs. The material portion of the Satekhat was as follows:—

At the Court-sales on October 23rd and 24th, 1901, the immoveable property of Sundar Ramchandra was put to sale and purchased by us as the highest bidders. Its price Rs. 1,599 having been received in cash we sell (it). Its Survey numbers are as under :—

Of the lands of the above written survey numbers, including the mango trees, grafted and *raival*, standing thereon, to-day, we, after receipt of rupees in cash, have sold to you the said written property.

The *Satekhat* was silent as to the varkas land, Survey No. 8, and the house. The conveyance was to be executed after the defendants obtained the certificate of sale from the Court. They got the certificate on the 15th January 1902 and thereafter some correspondence having passed between the parties, the plaintiffs on the 21st August 1902 wrote, through their pleader, to the defendants to the effect that the property agreed to be conveyed

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to them was *all the lands and house, &c.*, of Sundar Pandurang put up to auction on the 23rd and 24th October. The defendants stated in reply: "It is evident that the vicious idea of claiming the house occurred to your clients after the 10th July last. The agreement was to sell to your clients that property alone that was mentioned in the *Satekhat*. In the *Satekhat* there is no agreement about the sale of the house." The plaintiffs, thereupon, brought the present suit alleging that they had acted according to the conditions of the *Satekhat* and the defendants refused to carry out those conditions. The plaintiffs, therefore, prayed for (a) specific performance of the agreement of sale, (b) a decree directing the defendants to execute a deed of sale for Rs. 1,599 and to register the conveyance and to pay to the plaintiffs the balance that would remain after deducting from the sum of Rs. 201 given to the defendants for the expenses of preparing the conveyance, (c) an order directing the defendants to get the properties in dispute transferred to the names of the plaintiffs, (d) possession of the said properties, and (e) mesne profits from the date of suit till the delivery of possession to the plaintiffs. They also sought in the alternative to recover Rs. 1,800 (1,599 + 201) paid to the defendants, as damages for breach of the contract in case the Court held that specific performance could not be decreed.

The defendants admitted the execution of the *Satekhat* and receipt of Rs. 1,800 and contended *inter alia* that the price was not settled at Rs. 1,599, that they had not agreed to sell the varkas land, Survey No. 8, and the house, that the said two properties had not even been mentioned in the *Satekhat*, that the properties agreed to be sold had been specified therein, that the suit for properties not mentioned in the *Satekhat* would not lie, that they had not broken the contract and were always ready to pass the conveyance, but the plaintiffs refused to take it and that the plaintiffs had not suffered any loss and the defendants were not liable to pay damages.

The Subordinate Judge found that the defendants had not agreed to sell to the plaintiffs the varkas land, Survey No. 8, and the house, that under the agreement of sale the plaintiffs

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had to pay to the defendants Rs. 1,800 for the price of the property, that the plaintiffs had broken the contract, that they were not entitled to a declaration directing the defendants to have the lands transferred to the plaintiffs' name, and that the plaintiffs were entitled only to recover Rs. 1,800 from the defendants. He, therefore, passed a decree awarding to the plaintiffs Rs. 1,800.

On appeal by the plaintiffs the Judge found that the varkas land, Survey No. 8, only was agreed to be sold and not the house, that the omission of the varkas land from the *Satekhat* was the result of inadvertence on the part of the writer, that is, was the result of a mutual mistake, that the non-claim in the plaint for the rectification of the *Satekhat* was not fatal to the relief for specific performance with respect to the varkas land only and not the house, that Rs. 1,800 was the amount agreed between the parties as the price and that the plaintiffs were entitled to the transfer of the khata and possession of all the plaint property excepting the house and also to mesne profits the amount of which was to be determined in execution. He, therefore, reversed the decree and passed one in the following terms :—

Plaintiffs should apply under section 261 (of the Civil Procedure Code) for execution of a conveyance in the event of defendants failing to do so. The property to be mentioned in the conveyance as sold is all the plaint lands, but not the house.

On the execution of the conveyance, the plaintiffs are declared entitled to the khata of those lands; and they are entitled to get possession thereof, together with mesne profits from date of suit till possession or three years from this date, whichever be the earlier, the amount being determined in execution.

The following are extracts from the judgment :—

The defendants admitted the execution of the *Satekhat* and receipt of Rs. 1,800, and pleaded *inter alia* that the agreed price was not Rs. 1,599; that the house and the varkas land did not, either in the oral agreement or the *Satekhat*, form part of the subject-matter of the contract; that they were ever ready to pass a conveyance about the property specified in the *Satekhat*, but the plaintiffs refused to take it; that the plaintiffs have not paid the Rs. 108-1-7 mentioned in the plaint; had not suffered any damage and were not entitled to specific performance; * * * and that they were willing to repay the sum of Rs. 1,599.

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On these pleadings issues were framed by the Additional Sub-Judge Mr. Sanjana. The most material of them was whether the defendants had agreed to sell to the plaintiffs the properties described in the lots Nos. 2 and 3 (*i. e.*, the house and the varkas land) in paragraph 1 of the plaint. The plaint being wholly silent on the point of the alleged omission in the *Satekhat* of the said two lots as the result of mutual mistake, and on the point of rectification, as one of the reliefs sought for, of the *Satekhat*, these two points found no place in the issues framed.

Had the matter stopped there, and the parties gone to trial on the understanding that the case as laid in the plaint was the *whole* of the plaintiffs' case, on which he (they?) sought the several reliefs there is no question that the observations in the lower Court's judgment based on the provisions of section 92 of the Evidence Act would have been perfectly unexceptional. But it appears from Mr. Modi's minutes of the proceedings that the plaintiffs' true case, *i. e.*, mistaken omission of the house and land from the *Satekhat*, was brought to the notice of the Court and of the opposite side at an early stage before the case entered on the stage of evidence. Under date 21st February 1903 the following item appears in the minutes:—"Mr. Shavaksha (plaintiffs' pleader)—I shall adduce evidence that the description was written from the *jahirnama* and the writer did not turn over the leaf and did not see the writing on the other side The house appears on the other hind side of the other sheet. He has not turned on to that at all. The No. 8 varkas is also on the other side and has been omitted."

The most appropriate way of dealing with this amplification of the plaintiffs' case would have been to have it incorporated in the plaint by amendment and by the addition of a prayer for rectification. But the trial proceeded without any amendment as if the real case being known, no formal amendment was necessary. In these circumstances, I feel constrained to differ from the lower Courts' view, and to hold that the plaintiffs' case has been the one that was disclosed in the plaint and amplified *aliunde* by Mr. Shavaksha in his above quoted argument. In a suit for specific performance rectification of the instrument is virtually a subsidiary and ancillary relief (*vide* section 34 of the Specific Relief Act), and may well be awarded in the present case though not specifically asked, in view of the peculiar circumstances detailed above, and I propose to award it on condition of plaintiffs' paying in the requisite Court-fee, if any.

Assuming, therefore, that rectification is one of the reliefs claimed, I proceed to consider whether a case for that relief has been made out; in other words, whether the house and the varkas land or either of them were or was part of the property contracted to be sold and purchased.

* * * * *

From this it is obvious that, whatever might have been their real intention and the real agreement between them, the parties instructed the writer to write a *Satekhat* of the *lands* of Sundar Ramchandra put up to Court-sale and handed

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to him the proclamations to take down the description of those lands from, but did not tell him that a house also had been put to Court-sale and was to be included in the *Satekhat*. In other words, the contract for sale as communicated by the parties to the writer for being embodied in writing, related to and covered all the said lands of Sundar but no house. At any rate, the writer's evidence proves that the omission of the varkas land, if not also that of the house, was a pure inadvertence on his part.

* * * * *

It will be seen that the letter makes no mention of the exclusion of the varkas land from the property sold, and this omission is significant in view of the exception taken in relation to the house as soon as it was pointedly asserted by the vendees that all the property including "the house, &c.", was agreed to be sold. In this (Exhibit 28) and another letter (Exhibit 25), the amount of assessment claimed is Rs. 69-15-10, which is obviously inclusive of the assessment on the varkas land also (*vide* Exhibit 14 in appeal).

I therefore feel satisfied on all this evidence that the varkas land was included in the property agreed to be sold, and that its omission from the *Satekhat* was the result of inadvertence on the writer's part and not intentional, that is, was the result of mutual mistake. The *Satekhat* deserves rectification accordingly.

Defendant 2 preferred a second appeal.

Ramdatt V. Desai for the appellant (defendant 2):—The language of the *Satekhat* is clear enough. It shows that the property which was described by survey numbers was sold. The plaint starts with the assertion that the whole of the property of Sundar Ramchandra was agreed to be sold under the *Satekhat*. There is no allegation in the plaint that any property was omitted in the *Satekhat*.

Both the lower Courts have found as a fact that the *Satekhat* does not include all the properties. The parties went to trial on the question as to whether the *Satekhat* included the whole of the property or only a part thereof. The first Court having found that the *Satekhat* did not apply to the whole of the property, the plaintiffs in appeal made out a new case, namely, that the *Satekhat* was not properly drawn up and that it did not express the real agreement between the parties. Such a case was never made out in the first Court and the Judge in appeal was not justified in allowing it to be made for the first time. Under these circumstances the amendment of the plaint was not proper. In appeal the Judge did not arrive at any clear finding that

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there was really a mistake which was common to both the parties. Under section 31 of the Specific Relief Act the Court must find it clearly proved that there has been a mistake in framing the instrument.

M. B. Chaubal for the respondents (plaintiffs):—The amendment of the plaint was not wrongly allowed. Although in the plaint itself no reference was made to the mistaken omission of the house and varkas land in the *Satekhat*, the pleadings show that we had brought the omission to the notice of the Court and the defendants. Therefore, when the amendment was allowed in appeal, it cannot be said that a new case was made out for us. The amendment only brought the record in conformity with the pleadings in the case. The defendants cannot be said to have been taken by surprise because they knew that that was our case from the commencement of the trial. Though no specific issue as to mutual mistake was raised, still the parties went to trial on that footing. The Judge in appeal has actually found that the omission of the varkas land from the *Satekhat* was due to mutual mistake. This is a finding of fact and no valid reason has been shown to discard it.

JENKINS, C. J.:—This is a suit for specific performance of an agreement for sale in which the plaintiffs are the purchasers. They allege that the agreement comprises, in addition to other pieces of property, some *varkas* land and a house.

It has been held by both the Courts that the written document of sale does not in terms comprise either the *varkas* land or the house.

The first Court on that ground dismissed the suit.

In the lower appellate Court the point was raised by Mr. Chaubal, who appeared for the plaintiffs, that if the document did not comprise both the *varkas* land and the house, then that was in consequence of a mutual mistake, and he accordingly applied for leave to amend so as to include in his plaint a claim for rectification. This application was made in January 1905.

The Judge of the lower appellate Court acceded to the application notwithstanding the protest of the defendants; and in the result he found that by mutual mistake *varkas* land had been wrongly omitted from the document; as to the house, however,

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he held against the plaintiffs' contention. The result was that in the lower appellate Court a decree for specific performance was passed extending to the *varkas* land.

One of the defendants now appeals to this Court, and he objects before us that the amendment should not have been allowed. We are unable to say that it was not within the discretion of the Judge to allow the amendment, but we think that it may be a question whether it should have been allowed unless the application was made within such time as not to deprive the defendants of any defence of limitation.

We have not sufficient materials before us to express an opinion one way or the other on that point, and we do desire not to conclude ourselves from upholding the amendment even if the defendant is thereby deprived of the defence of limitation until all the relevant materials are placed before us.

But, assuming for the sake of argument that the amendment was one which the Judge properly allowed, we still think that it was incumbent on the Court not to decide a case on the materials then before it, but to remand the suit in order that the parties might have an opportunity of adducing evidence on this point.

Now to establish a right to rectification it is necessary to show that there has been either fraud or mutual mistake. Fraud is out of the question. We only have to reckon with mutual mistake and under the terms of section 31 of the Specific Relief Act it is necessary that the Court should find it clearly proved that there was such mistake. We cannot discover in the judgment that the necessity for clear proof was present to the mind of the Court. It may be that the Judge was satisfied within the meaning of this section, but that does not appear on the face of his judgment.

Now this requirement that the Court should find it clearly proved is not a refinement introduced by section 31 for the first time. This section merely gives expression to what has been laid down by the Courts; and we refer in particular to a decision in *Fowler v. Fowler* ⁽¹⁾, where it is said as follows:—

(1) (1859) 4 De G. & J. 250 at . 264.

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"The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. Lord *Thurlow's* language is very strong on this subject: he says, 'the evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence'; *Lady Shelburne v. Lord Inchiquin*⁽¹⁾. And this expression of Lord *Thurlow* is mentioned by Lord *Eldon* in the *Marquis of Townshend v. Stangroom*⁽²⁾, without disapprobation. If, however, Lord *Thurlow* used the word 'irrefragable', in its ordinary meaning, to describe evidence which cannot be refuted or overthrown, his language would require some qualification; but it is probable that he only meant that the mistake must be proved by something more than the highest degree of probability, and that it must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties. It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement."

This, we think, fully bears out what we have said as to the necessity that the Court should find it clearly proved that there had been a mistake.

Therefore we send down the following issues:—

- (1) Whether it is clearly proved that there has been a mutual mistake in framing the document, Exhibit 9, which resulted in the omission therefrom of this piece of *varkas* land?
- (2) When did the mistake first become known to the plaintiffs?
- (3) What was the real intention of the parties in relation to the *varkas* land?

Parties to be at liberty to adduce further evidence.

Finding should be returned in two months.

(1) (1784) 1 Br. Ch. Ca. 341.

(2) (1801) 6 Ves. 334.

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We would only wish to add that though we have raised an issue as to when the matter first became known to the plaintiffs, it does not mean that we now decide that the case falls within Article 96, Schedule II, of the Limitation Act, or that if it does, and the plaintiffs did become aware more than three years prior to the application, we will necessarily disallow the amendment. It is a matter which we leave open for discussion when the case again comes before the Court.

Issues sent down.

G. B. R.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batty.*

1906.

February 23.

AMOLAK BANECHAND AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS,
v. DHONDI VALAD KHANDU BHOSLE AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Land Revenue Code (Bom. Act V of 1879), sections 56, 57, 153†—Arrears of assessment—Forfeiture by Government—Mortgage—Land in possession of

* Second Appeal No. 43 of 1905.

† Sections 56, 57, 153 of the Land Revenue Code (Bom. Act V of 1879).

56. Arrears of land revenue due on account of land by any holder shall be a paramount charge on the holding and every part thereof, failure in payment of which shall make the occupancy or alienated holding, together with all rights of the occupant or holder over all trees, crops, buildings and things attached to the land, or permanently fastened to anything attached to the land, liable to forfeiture, whereupon the Collector may levy all sums in arrear by sale of the occupancy or alienated holding, freed from all tenures, incumbrances and rights created by the occupant or holder or any of his predecessors-in-title, or in anywise subsisting as against such occupant, or holder, or may otherwise dispose of such occupancy or alienated holding under rules or orders made in this behalf under section 214.

57. It shall be lawful for the Collector, in the event of the forfeiture of a holding through any default in payment or other failure occasioning such forfeiture under the last section or any law for the time being in force, to take immediate possession of the land embraced within such holding and to dispose of the same by placing it in the possession of the purchaser or other person entitled to hold it according to the provisions of this Act or any other law for the time being in force.

153. The Collector may declare the occupancy or alienated holding in respect of which an arrear of land revenue is due, to be forfeited to Government, and sell or otherwise dispose of the same under the provisions of sections 56 and 57, and credit the proceeds, if any, to the defaulter's account.

the occupant—Re-grant by Government to the occupant—Suit by mortgagee to recover possession—Equities arising out of the conduct of the parties.

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Forfeiture ordinarily implies the loss of a legal right by reason of some breach of obligation.

When arrears of assessment are levied by sale, then section 56 of the Land Revenue Code (Bom. Act V of 1879) in pursuance of an obvious policy, empowers the Collector to sell "freed from all tenures, incumbrances and rights created by the occupant.....or any of his predecessors-in-title or in anywise subsisting against such occupant." Should the Collector otherwise dispose of the occupancy, the section affords no such protection, and the legal relations must be determined by reference to the ordinary law. So judged, the effects of a forfeiture and the subsequent acquisition of the forfeited property are subject to the control of equities arising out of the conduct of the parties.

Balkrishna Vasudev v. Madhavarav Narayan⁽¹⁾ followed.

SECOND Appeal from the decision of C. D. Kavishvar, First Class Subordinate Judge of Násik, with appellate powers, reversing the decree of K. G. Kittur, Subordinate Judge of Pimpalgaum.

The land in suit belonged to the defendant who mortgaged it with possession to the plaintiff and himself continued in possession under a kabulayat. On the expiry of the kabulayat the plaintiff having brought a suit for the recovery of possession and mesne profits for three years, the defendant denied the rent-note (kabulayat) and contended that the land was forfeited for arrears of Government assessment, that the Government having re-leased the land to the defendant, the plaintiffs' rights as mortgagee were extinguished, that the defendant held the land free of the mortgage-debt and that the plaintiff had no right at all.

The Subordinate Judge found that the kabulayat to the plaintiff was proved, that under the rulings in *Ganparshibai v. Timmaya*⁽²⁾ and *Mulchand v. Shapurji*⁽³⁾ the defendant was not freed from liability because the land was forfeited by Government and re-leased to him and that as between Government and the occupant, the latter was in the first instance liable to pay the assessment and that as between the plaintiff and the occupant, the former was liable to pay it. He, therefore, allowed the claim for possession and mesne profits.

(1) (1880) 5 Bom. 73.

(2) (1899) 24 Bom. 34.

(3) (1898) P. J., p. 8.

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On appeal by the plaintiff the Judge reversed the decree and dismissed the suit on the following grounds :—

The land was forfeited and taken possession of by Government (Exhibit 31) and it was again let to the defendant, the Khatedar, on his paying the assessment for the previous year and the year that was going, and passing a fresh kabulayat. Exhibit 27 shows that it was forfeited and Exhibit 28, the order of the Mamlatdar of Chandwad to Patil Kulkarni, dated 27th November, 1900, shows that the land was given again. The new kabulayat passed by the defendant to Government was not produced in the lower Court, but a copy of it is put in here (Exhibit 11). It shows that the land was lying waste after forfeiture and it was let to Dhondi on fresh conditions that he should return the land to Government in case he did not want to cultivate it; that he shall not mortgage or sell it to anybody, nor should he transfer it to anybody's name, and that in case the land be sold in future for the recovery of any Government dues and if any balance be left after deducting the dues, that balance must go to Government and should not be claimed by Dhondi. Thus the land was let to Dhondi under fresh contract and several conditions which were not in existence during the previous holding. Government has not returned the land to Dhondi unconditionally on his paying assessment for 2 years, but it is released from 7th December, 1900. Thus the plaintiff's mortgage right is extinguished and his right as mortgagee is not in existence now, and consequently he has no right to obtain possession of the land, nor is he entitled to recover any rent which became due in 1901 and subsequent years. The ruling published at I. L. R. 24 Bombay, page 34, quoted by the lower Court, does not apply here. Here the land is given under a fresh lease with conditions that the Khatedar should not mortgage, sell or transfer the land to any other person. Thus the plaintiff lost his right under his mortgage as soon as Government ordered forfeiture of the land and leased the land again as Government waste land free from any former right of anybody and granted him a qualified right as a tenant of Government. The plaintiff has no right to recover possession of the land under the kabulayat sued on, nor any rent for the period subsequent to forfeiture of the land.

Plaintiff having died pending the appeal, his sons and heirs were brought on the record and they preferred a second appeal. While the second appeal was being argued the Court (Jenkins, C. J., and Batty, J.) recorded the following interlocutory judgment on the 13th October, 1905 :—

We think this case should be argued after the Government have had an opportunity, if they so desire, of being present; seeing that the appellant questions the right of the Government to dispose of property where there has been a declaration of forfeiture followed by a disposition of the property in favour of the former occupant with a restriction on alienation.

If the Government desire to appear on this second appeal waiving any objection to the fact that the suit was not instituted in the District Court, and also under the Revenue Jurisdiction Act, then we would be willing to add the Secretary of State as a party, and to hear any argument he may have to advance on the point.

We came to this conclusion because a careful examination of the cases leads us to doubt how far there is any binding authority that a declaration of forfeiture has no legal effect under the Code.

The Secretary of State having expressed his willingness to be a party to the second appeal, the Collector of Nasik was joined as respondent 2.

S. R. Bakhle appeared for the appellant (plaintiff):—Under section 56 of the Land Revenue Code, default in the payment of land revenue involves liability to forfeiture. After the declaration of forfeiture the Collector is entitled under the section to recover the arrears of revenue by sale of the occupancy or holding, and it is when such sale is held that the occupancy passes to the purchaser freed from all tenures, incumbrances and rights created by the occupant or holder. Mere order of forfeiture has not the effect of extinguishing previous incumbrances or rights. The section provides that the Collector may dispose of the holding in any other way under the rules framed under that section and section 214. Before the amendment of the Land Revenue Code there was no rule in it under which a holding could be re-granted to the defaulter freed from all incumbrances. It was the sale alone which could bring about the extinguishment of prior incumbrances and rights: *Ganparshibai v. Timmaya*.⁽¹⁾ It has been held that a mere declaration of forfeiture has no effect in law under the Land Revenue Code: *Narayan v. Parshotam* ⁽²⁾, *Mulchand v. Shapurji* ⁽³⁾. We, therefore, contend that notwithstanding the order of forfeiture our rights as mortgagee and landlord still subsist.

R. R. Desai appeared for the respondent (defendant):—The plaintiff mortgagee was to pay the assessment under the terms of the mortgage and he was called upon by the Mamlatdar to do so. On his failure to pay, the Collector declared forfeiture. The

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DHONDI.⁽¹⁾ (1899) 24 Bom. 34.⁽²⁾ (1896) 22 Bom. 339.⁽³⁾ (1898) P. J., p. 8.

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plaintiff is, therefore, estopped from contending that the order of forfeiture did not extinguish his rights. The Collector seems to have acted under section 57 of the Land Revenue Code because he took immediate possession and seems to have taken further action under Rule 59 of the rules framed under section 214 of the Code. After the Collector takes possession of a forfeited holding all prior rights come to an end. That is the effect of the ruling in *Ganparshibai v. Timmaya*⁽¹⁾. Further we paid the arrears of revenue, therefore, in equity we are entitled to be in possession.

Raikes (Acting Advocate General with *Rao Bahadur V. J. Kirtikar*, Government Pleader) appeared for respondent 2 (Collector of Nasik who was joined as a party in the second appeal):—The Collector acted under Rules 59 and 62. The land was, after forfeiture, entered in the revenue records as unoccupied waste land and was subsequently dealt with as provided in Rule 62.

Bakkie in reply:—Exhibit 28 shows that the land was not treated as waste or unoccupied and Government did not take possession. The notice issued by the Mamlatdar calling on the defendant to pay the arrears and take up the land shows that it was intended that defendant should take up the land under the new restricted tenure in derogation to our rights.

JENKINS, C. J.:—The defendant mortgaged a survey number to the plaintiff, and passed a *kabulayat* in his favour. The plaintiff now sues the defendant for possession of the land.

The defence is that since the mortgage and *kabulayat* the land has been forfeited by the Government for non-payment of assessment in arrear; that all prior rights in it were thereby destroyed; and that it was then leased to the defendant free from all incumbrances.

The defence has prevailed in the lower appellate Court, from whose decree the present appeal has been preferred.

The point is one of importance in which the Government are interested, and on their consenting to waive all objections, we

(1) (1899) 24 Bom. 34.

have, in accordance with their desire, added the Secretary of State as a party.

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Section 56 of the Land Revenue Code provides that arrears of land revenue due on account of land by any landholder shall be a paramount charge on the holding and every part thereof, failure in payment of which shall make the occupancy or alienated holding, together with all rights of the occupant or holder over all trees, crops, buildings and things attached to the land, or permanently fastened to anything attached to the land, liable to forfeiture, whereupon the Collector may levy all sums in arrear by sale of the occupancy or alienated holding, freed from all tenures, incumbrances and rights created by the occupant or holder or any of his predecessors in title, or in anywise subsisting as against such occupant or holder, or may otherwise dispose of such occupancy or alienated holding under rules or orders made in this behalf under section 214.

And by section 57 it is declared that it shall be lawful for the Collector, in the event of the forfeiture of a holding through any default in payment or other failure occasioning such forfeiture under the last section or any law for the time being in force, to take immediate possession of the land embraced within such holding, and to dispose of the same by placing it in the possession of the purchaser or other person entitled to hold it according to the provisions of this Act or any other law for the time being in force.

Under section 153 the Collector may declare the occupancy in respect of which an arrear of land revenue is due to be forfeited to Government, and sell or otherwise dispose of the same under the provisions of sections 56 and 57, and credit the proceeds, if any, to the defaulter's account.

The lower appellate Court has found that "the land was forfeited and taken possession of by Government, and it was again let to the defendant, the Khatedar, on his paying the assessment for the previous year and the year that was going, and passing a fresh kabulayat."

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What, then, is the legal consequence of this finding?

Forfeiture ordinarily implies the loss of a legal right by reason of some breach of obligation, and thus we find it said by Blackstone in Chapter XVIII of his Commentaries⁽¹⁾ that "Forfeiture is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they go to the party injured as a recompense for the wrong which either he alone, or the public together with himself, hath sustained."

In support of his contention that the forfeiture had no legal consequences, the appellant principally relies on *Ganparshibai v. Timmaya Shivappa Halepai*⁽²⁾.

But while it is there said of the landlord, the plaintiff in that suit, that "the forfeiture *per se* did not destroy the relations existing between him and his tenant," it is in the preceding sentence conceded that "so it may have done as between him and Government."

Other cases were cited to us, but they seem to us to go no further in the direction for which the plaintiff contends.

No doubt in *Mulchand Bhagwanji v. Shapurji Dadabhai*⁽³⁾ it is said that "forfeiture in itself has no direct legal consequences under the Code", but it is conceded in *Ganparshibai's* case by Candy, J., who was a party to the decision in *Mulchand Bhagwanji v. Shapurji Dadabhai*, that the cases on which this statement is based "may not have been quite apposite". We agree with this comment, and, therefore, refrain from discussing those cases.

If, by the phrase we have cited, it is meant that the Code does not define the consequences of a "forfeiture in itself", then no exception can be taken to it, but we see in that no reason for withholding from the word *forfeiture* its ordinary legal significance.

When the arrears are levied by sale, then section 56, in pursuance of an obvious policy, empowers the Collector to sell 'freed from all tenures, incumbrances and rights created by the

(1) Book II, p. 267.

(2) (1899) 24 Bom. 24.

(3) (1898) P. J. p. 8.

occupant . . . or any of his predecessors-in-title or in any-wise subsisting as against such occupant". Without such protection no one would buy except at a price fixed to meet the risks involved.

Should the Collector otherwise dispose of the occupancy, the section affords no such protection; and the legal relations must be determined by reference to the ordinary law. So judged, the effects of a forfeiture and subsequent acquisition of the forfeited property are subject to the control of equities arising out of the conduct of the parties, and for this proposition there is the sanction of Sir M. Westropp's decision in *Balkrishna Vasudev v. Madhavarav Narayan* ⁽¹⁾. (Cf. section 90 of the Indian Trusts Act).

And, in our opinion, it is by reference to that principle that this case must be decided.

This aspect of the case has not been considered by the lower appellate Court, and we must, therefore, remand the case for the determination of the following issues :—

1. Has the defendant, by availing himself of his position as Khatedar, gained an advantage in derogation of the rights of the plaintiff or otherwise by his conduct created an equity in favour of the plaintiff?

2. If so, is the plaintiff entitled to any, and what, relief?

Parties may adduce further evidence. Return in two months.

Issues sent down.

G. B. R.

(1) (1880) 5 Bom. 73.

ORIGINAL CIVIL.

Before Mr. Justice Batchelor.

1905.

October 14.

THE ADVOCATE GENERAL OF BOMBAY, PLAINTIFF, *v.* ADAMJI
MAHOMEDALLI AND ANOTHER, DEFENDANTS.*

*Advocate General—Affidavit of documents by order of the Prothonotary
against Advocate General—Power of the Court—Prerogative of the Crown
—Practice—High Court Rule 80a—Civil Procedure Code, section 129.*

The position of the Advocate General in India corresponds by statutory enactments to the position held by the Attorney General in England and there is ample authority for the view that generally speaking the Attorney General is not called upon to make discovery on oath. An order by the Prothonotary calling upon the Advocate General to show cause why a suit instituted by him should not be dismissed for want of prosecution is not one which is within the jurisdiction of the Prothonotary to make.

SUMMONS in Chambers.

The Attorneys for the 1st defendant served the Attorneys for the plaintiff with an order signed by the Prothonotary for an affidavit of documents. The plaintiff's Attorneys accordingly furnished the Advocate General with a draft affidavit of documents for his approval. The Advocate General declined to approve it on the ground that it was not the practice for the Advocate General to make such affidavits, but he stated that there was no objection to the relators by whom he was put in motion making such affidavit as the defendants desired.

The Attorneys for the 1st defendant, thereupon, took out a summons calling upon the Advocate General to show cause why the suit should not be dismissed for want of prosecution.

Bahádurji in support of summons.

Scott, Advocate General, shewed cause.

Discovery *on oath* cannot be obtained from the Attorney General: *Prioleau v. United States*, and *Andrew Johnson*⁽¹⁾. Nor can discovery be compelled from the Crown: *Attorney-General v. Newcastle-upon-Tyne Corporation*⁽²⁾. The same points are dealt with in *Kerr* on discovery, Chapter IV, page 94, and *Daniell's Chancery Practice*, 6th Ed., pp. 158, 1812. A charity suit filed

* Suit No. 125 of 1905.

(1) (1863) L. R. 2 Eq., 659 at p. 664. (2) [1897] 2 Q. B. 384 at pp. 388, 395.

by the Advocate General is filed for the Crown: *Daniell's Chancery Practice*, pp. 48, 49, 157 *cf.* 53, George III, c. 155, sec. 111, Ilbert on Government of India, p. 255, sec. 109. For the Crown to be bound by an Act it must be expressly intimated. See *The Secretary of State for India v. Mathurabhai*⁽¹⁾. The order made in the case by the Prothonotary is not made either under the Code or under the Rules of the High Court. The defendant is to blame for asking such an order of the Prothonotary. Even if this order is covered by High Court Rules 75(f) and 80(a) it was not obtained with the written consent of the parties concerned and is therefore invalid. This consent is requisite under the rules as otherwise the Prothonotary has no jurisdiction to act judicially.

Quasi-judicial acts may be delegated: Civil Procedure Code, section 637; these are acts which the Code requires to be done by a Judge. The High Court's powers to make rules under the Letters Patent to regulate its own procedure as regards its original civil jurisdiction cannot affect the prerogatives of the Crown.

The making of an order for discovery on affidavit of documents falls under section 129 of the Code and may be made through the Court only; and under High Court Rule 153 can only be made by the Court as Judge, this rule not being one of those mentioned in Rule 80 (a) under which applications are to be made to the Prothonotary.

In any event the granting of such discovery is a matter of judicial discretion and not a matter of course. Clearly the present case is not one in which the Court would exercise such discretion for the practice is to offer such inspection as is necessary and this has been done.

BATCHELOR, J.:—This is a case of a Chamber order which has been issued by the Prothonotary calling upon the Advocate General as plaintiff in Suit No. 125 of 1905 to show cause why this suit should not be dismissed for want of prosecution.

Unquestionably this is rather a strong order and in my opinion under section 80 (a) of the High Court Rules it is not an order which was within the jurisdiction of the Prothonotary. Admittedly there was no consent of the Advocate General to that

1905.

THE
ADVOCATE
GENERAL OF
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(1) (1889) 14 Bom. 213 at p. 212.

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order, and when reference is made to the applications which under rule 80 (a) require consent before the Prothonotary has jurisdiction, it will, I think, be recognised that this application is at least on as high a footing as those mentioned in the rule.

Then it is not, I understand, denied that the position of the Advocate General here corresponds by statutory enactments to the position held by the Attorney General in England, and there is ample authority for the view that in general the Attorney General is not called upon to make discovery upon oath. It is relevant to add, as the Advocate General assures me, that so far as he recollects, he has not in the past been called upon to make such discovery. I should certainly be reluctant to introduce a practice different from that which obtains in England in this matter.

It appears to me that the difficulty has arisen almost entirely owing to the form of procedure which the first defendant has elected to adopt. It must have been patent to him from the first that the Advocate General was suing at the instance of relators, and the Advocate General has from the first been willing that the relators should make affidavits concerning the one relevant document in their possession, that is to say, the Will of Piroo Dossa, which is referred to in the annexure to the plaint.

The order must be discharged with costs as against the Advocate General.

As against the second defendant, the fact is that he has now filed his affidavit of documents, but as he did not do so until after this order was taken out, I think that the first defendant is entitled to his costs as against him.

Counsel certified as between plaintiff and first defendant.

I should add that I do not desire by this judgment to curtail the powers which the Prothonotary has hitherto exercised under Rule 80 (a). Here the case was a special one owing to the Advocate General being the plaintiff.

Summons dismissed and order discharged.

Attorneys for the Plaintiff:—*Messrs. Kanga and Patell.*

Attorneys for the Defendants:—*Mr. K. D. Shroff.*

W. L. W.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

KASHINATH CHIMNAJI, MINOR, BY HIS MOTHER AND NEXT FRIEND
REVABAI, PLAINTIFF, v. CHIMNAJI SADASHIV AND OTHERS,
DEFENDANTS.*

1906.
January 25,

High Court—Original Side—Practice—Suits by manager of joint Hindu family having minor co-parceners—Minors' names should be added as parties—Will—Construction—Rule against perpetuity—Indian Succession Act (X of 1865), section 101.

As a matter of practice suits are not filed on the Original Side of the Bombay High Court by managers representing their minor co-parceners, the practice is to join all persons interested, but it would seem that even if on the face of the plaint there were an allegation of a sole plaintiff that he sued as manager on behalf of a co-parcenary the minor co-parcener would not be bound by the proceedings unless by judicial sale under the decree rights had been created in innocent third parties and no prejudice were shown to the absent minors.

Clause 13 of the will produced in this case was as follows :—

"As to my other property which there is, that is the property situated on the east side of the house of my step-brother, I give the same to my younger son Chiranjiv Mahadev for his life. He shall have no authority either to mortgage or to sell the said property. He shall only receive the income of the said property and I give the property after his death to his son or to his sons in equal shares should there be (any such son or sons). In case he leaves no son behind him my Mukhtyars shall get a son adopted by his wife and thus perpetuate his name. And they shall give the said property to him on his attaining the age of 21 years."

Held, on a construction of the above clause, that the bequest in favour of a son of Mahadev who might be adopted at any time after Mahadev's death by a widow who might not have been living at the testator's decease was void under section 101 of the Indian Succession Act (X of 1865).

'THIS was a suit brought by the plaintiff to administer the estate of his grandfather Khandoji Ranoji.

Khandoji Ranoji had one son Shamji and one daughter Gaoobai by his first wife. He had one daughter Satbai and one son Mahadev by his second wife Muktabai. On the 16th November 1888, he made his last will and testament; and died on the 31st May 1892.

1906.

KASHINATH
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CHIMNAJI
SADASHIV.

Of this will, Muktabai and one Chimnaji Sadashiv (defendant No. 1) were appointed executors. The executors proved the will and probate was granted to them in 1893.

The material provisions of the will were as follows :—

"10. After paying the above-mentioned amounts in respect of maintenance and the Sarkar's dues and the Municipal bills, as to the balance that may remain, the same shall be collected together; and (out of the same) the expenses on account of the marriages of 'Chiranjiv' Mahadev and 'Chiranjiv' Satbai shall be made. After making the expenses on account of the marriages, as to the balance that may remain, the same shall be collected together and Government (promissory) notes shall be purchased with the same from time to time. And on 'Chiranjiv' Mahadev attaining the age of 21 years, the said balance and a moiety of the income collected, shall be handed over to him; and the other moiety shall be kept intact. The same shall be kept for the son of 'Chiranjiv' Shamji. But the said amount shall not be handed over to 'Chiranjiv' Shamji.

"11. Besides the above-mentioned immoveable property, as to whatever other moneys, etc., clothes and clothings, ornaments, etc., and goods and chattels there may remain after me, I give the whole of the same to my wife Muktabai.

"12. My above-mentioned immoveable property shall not be divided so long as my son 'Chiranjiv' Shamji may be alive. But after his (death) the said property shall be divided as follows:—Should "Chiranjiv" Shamji have a son or sons, then the house in which I now reside shall be given to such son or sons, in equal shares. Should he have no son, then the said house shall be given to my second son 'Chiranjiv' Mahadev and his heirs.

"13. As to my other property which there is, that is, the property situated on the east side of the house of my step-brother, I give the same to my younger son "Chiranjiv" Mahadev for his life. He shall have no authority either to mortgage or to sell the said property. He shall only receive the income of the said property, and I give the property, after his death, to his son or to his sons in equal shares should there be (any such son or sons). In case he leaves no son behind him, my "Mukhtyárs" shall get a son adopted by his wife and thus perpetuate his name and they shall give the said property to him on his attaining the age of 21 years."

In 1896, Muktabai died. Gaoobai died in the year following.

Mahadev, the younger son of Khandoji Ranoji, attained the age of 21 years on the 24th May 1901 and died thereafter on the 4th day of June 1902, without leaving any issue. After his death, his widow Parvatibai (defendant No. 3) adopted Rama (defendant No. 4) on the 20th May 1904 as son to her husband.

Shamji, the elder son of Khandoji Ranoji, was the father of the plaintiff. The plaintiff was not born at the date of the will,

nor was he in existence at the date of Khandoji's death. The testator made some special provision regarding Shamji in the will. It ran :—

“There is a son born of the womb of my first wife. His name is “Chiranjiv” Shamji Khandoji. . . . (My) elder son “Chiranjiv” Shamji does not act obedient to my orders. And he has also been behaving improperly with me, so much so, that I had driven him from my house twice. But considering that he is a son born of my loins and forgiving his faults, I have brought him again to my house. He is however still giving me extreme annoyance. And knowing that if I keep him in (my) house he will put me to a great loss, I intend to drive him from my house.

After my (death) also my son “Chiranjiv” Shamji shall not be kept in my house but he shall be kept separate. And out of the income of my above-mentioned property Rs. 10 shall be paid to him every month for his and his family's maintenance.”

In 1896, Shamji (defendant No. 2) filed suit No. 69 of 1896 in the High Court praying that the will of his father might be construed and that his rights in his father's estates might be ascertained. He sued in his own right and as the heir of his infant son who he alleged had been conceived in the life-time of the testator but was born and died after him and he claimed as the heir of such infant son what was given to such son under the will. The defendants in that suit were Muktabai, Chininaji (defendant No. 1) and Mahadev. This suit was decided by Mr. Justice Fulton on the 2nd October 1897. The material declarations in the decree were: that no son conceived in the testator's life-time was born to Shamji, that no division of the immoveable properties mentioned in clauses 12 and 13 of the will should take place until the death of Shamji. That Shamji and his brother Mahadev were to be paid Rs. 20 per month each during Shamji's life. After payment of the monthly allowances and the outgoings and expenses out of the income of all the immoveable property a moiety of the balance of income should on Mahadev attaining the age of 21 and thereafter so long as Shamji should be alive be paid to Mahadev or his representatives and the other moiety intended by the testator for Shamji's son should so long as Shamji be alive be divided equally between Shamji on the one hand and Mahadev or his representatives on the other. And that in the event of Mahadev dying leaving a son or sons of his loins there would be an intestacy in respect of the chawl property

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Mahadev died in June 1902 after he had attained 21 years.

In 1904, Shamji filed another suit (No. 20 of 1904) in the High Court for administration of the estate of his father and for a declaration that the plaintiff was entitled to the properties mentioned in clauses 12 and 13 of his father's will subject to the maintenance of Mahadev's widow and for possession thereof and for the ascertainment of his rights in the entire property. The defendants in that suit were Chimnaji and Parvatibai, the widow of Mahadev.

Chimnaji filed his written statement on the 19th March 1904.

On the 20th May 1904, Rama was adopted by Parvatibai as son to her husband. Under a consent Judge's order, he was made third defendant in the suit without any admission on the part of the plaintiff or the first defendant therein that the adoption was valid.

This suit resulted on the 19th January 1905 in a consent decree, whereby it was provided:

"This Court by and with such consent doth order that the properties of the deceased Khandoji Ranoji be divided equally between the plaintiff and the third defendant Rama Mahadev Andhele and this Court by and with such consent doth further order that maintenance at the rate of Rs. 20 per mensem be paid to the said second defendant Parvatibai by the said third defendant Rama Mahadev Andhele out of his share in the said properties . . . and this Court by and with such consent doth further order that the plaintiff and the said third defendant Rama Mahadev Andhele do take their half shares each as on an intestacy so that the same shall be ancestral in the hands of each . . ."

This decree was sealed in July 1905 and the first defendant Chimnaji made an appointment for the 22nd August 1905 to give charge of the properties in the evening.

On the same day, the plaintiff, a minor, represented by his mother and next friend Revabai brought this suit against Chimnaji, Shamji Khandoji, Parvatibai and Rama Mahadeo. The plaintiff prayed that the decree passed in suit No. 20 of 1904 be set aside as being obtained by fraud and collusion of the parties to that suit or some of them; that the will of Khandoji Ranoji may be construed and his estate administered; that the plaintiff's rights and interests in the property of his grandfather

may be ascertained and declared; and that such property as he may be found entitled to, may be secured to him and safeguarded during his minority, and ordered to be made over to him when he attained majority.

Rama Mahadev (defendant No. 4) contended in his written statement that he was duly and validly adopted by Parvatibai; that the plaintiff not being in existence at the death of Khandoji was incapable of taking any benefit whatsoever directly under the will, and whatever interest he was entitled to was under an intestacy and as an heir to his father Shamji and through him alone and that the consent decree was not obtained by fraud and collusion as alleged.

Jinnah and *Setalvad* for the plaintiff:—We say the consent decree does not bind us. We were no party to it. Shamji was a lunatic at the date of the consent decree in Suit No. 20 of 1904. Moreover, our father could not in law sufficiently represent our interest. As regards the adoption we say that it is bad for there was no express authority given to Mahadev's widow (defendant No. 3) by Mahadev during his life-time and that the adoption was not in fact made, and even if held proved, it would not divest the estate vested in Shamjee and the plaintiff. Moreover, under clause 13 of the will the authority to adopt is given to the widow and the executors and therefore it is bad. This authority does not survive after Khandoji's death. See *Amrito Lal Dutt v. Surnomoye Dasi*⁽¹⁾; *Lakshmi Bai v. Vishnu Vasudev*⁽²⁾. We further say that the gift in favour of Shamji's son under clause 12 is bad as Shamjee had no son at the date of the will and therefore the gift over is also bad and there is an intestacy.

As regards clause 13 the devise in favour of the adopted son is bad as there was no son adopted by the widow of Mahadev at Mahadev's death and therefore there is an intestacy and the plaintiff and the 2nd defendant Shamjee are entitled. The following cases were referred to in argument: *Anandrao Vinayak v. Administrator General of Bombay*⁽³⁾; *Balkrishna v. The Municipality of Mahad*⁽⁴⁾.

(1) (1900) 27 Cal. 996; 2 Bom. L. R. 446.

(2) (1905) 29 Bom. 410; 7 Bom. L. R. 436.

(3) (1895) 20 Bom. 450.

(4) (1885) 10 Bom. 32.

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Raikes, acting Advocate General, and *Padshah* for the second defendant Shamjee :—We say Shamjee was not a lunatic. The consent decree was for the benefit of the plaintiff. Under the decree he gets more than what he would have got under the will. Different considerations apply to the two clauses. Clause 12 has been construed by Mr. Justice Fulton in Suit No. 69 of 1896. According to it plaintiff has no present interest until Shamjee's death as the expression is "leaving a son at his death." This decision is binding on the plaintiff. As regards clause 13 the plaintiff has no present right. The income is subject to accumulation. It is only on Shamjee's death that plaintiff would take it in the event of no adoption. Moreover there is the express authority of Mahadev to adopt. Even if there is no such authority the adopted son of Mahadev would take as a *persona designata*. In any view the decree is for the plaintiff's benefit who is a minor and the Court should always have regard to this fact.

Bhandarkar (with *Bahadurjee*) for defendants Nos. 3 and 4 :—We say that the consent decree is binding on the plaintiff. His father Shamjee sufficiently represented his interest. A compromise made by a father is binding on the sons. The decree is nothing more than a compromise in the nature of a partition between Shamjee and Mahadev's representative. The property in clause 13 is more valuable than that of clause 12 and if the decree is set aside on a possible construction the plaintiff would be a loser if the adoption is upheld. See *Pitam Singh v. Ujagar Singh*⁽¹⁾; *Jagan Nath v. Mannu Lal*⁽²⁾; *Radhabai v. Anantrav*⁽³⁾; *Jehangir v. Bai Kukibai*⁽⁴⁾; *Rameshwar Prosad Singh v. Lachmi Prosad Singh*⁽⁵⁾.

Moreover, we say that there was an express authority given to defendant No. 3 by Mahadev, and that defendant No. 4 was adopted under this authority. This is sufficient to divest any estate that may be vested in Shamjee. Further, Khandojee has given express directions to his executors to get a boy adopted. The case of *Lakshmibai v. Vishnu Vasudev*⁽⁶⁾ does not apply as

(1) (1873) 1 All. 651.

(2) (1894) 16 All. 231.

(3) (1885) 9 Bom. 198.

(4) (1903) 27 Bom. 281; 5 Bom. L. R. 131.

(5) (1903) 31 Cal. 111.

(6) (1905) 29 Bom. 410; 7 Bom. L. R. 436.

there was no disposition of beneficial interest in favour of the adopted son, as is the case here.

Again, under clause 13, the adopted son is entitled to succeed independently of any consent of Shamjee. He takes it as a *persona designata*. The estate is not left in abeyance between the period between Mahadev's death and the adoption. According to the judgment of Mr. Justice Fulton there is not to be any division of *corpus* till Shamjee's death and until it is so done, an adopted son can come in by virtue of his adoption. He takes it as donee under a power of appointment. See *Yethirajulu Naidu v. Mukunthu Naidu*⁽¹⁾; *Gurlingapa v. Nandapa*⁽²⁾. There is no intestacy as regards clause 13 and the plaintiff is not entitled to succeed.

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SCOTT, J.:—This suit is brought by the plaintiff, a minor, by his mother, as his next friend, to have a consent decree passed in Suit No. 20 of 1904 set aside and to have the estate of his grandfather Khandoji Ranoji administered.

Khandoji Ranoji died on the 31st of May 1892 leaving two sons, Shamji (the plaintiff's father) and Mahadev. Mahadev died on the 4th of June 1902 at the age of 22 without issue but leaving a widow.

Shamji is still alive.

By his will Khandoji gave directions regarding the disposal of the income and *corpus* of two immoveable properties in Bombay mentioned in clauses 12 and 13 of his will.

In 1896 Suit 69 of 1896 was filed by Shamji against the executor and executrix of Khandoji's will and against Mahadev for construction of the will.

Mr. Justice Fulton held that the immoveable property was not to be divided till after the death of Shamji but that as to the balance of income if Mahadev attained twenty-one he or his representatives should receive $\frac{3}{4}$ thereof during Shamji's lifetime, the remaining $\frac{1}{4}$ going to Shamji; that at the death of Shamji leaving a son the house mentioned in clause 12 would be dealt

(1) (1905) 28 Mad. 363.

(2) (1896) 21 Bom. 797.

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with as intestate property of the testator but if Shamji died leaving no son it would go to Mahadev absolutely.

The devolution of the house mentioned in clause 13 was not decided.

As above stated Mahadev attained twenty-one and died a year later. On Mahadev's death Shamji filed Suit 20 of 1904. He set out the following facts.

That Khandoji died on the 31st May 1892 leaving a will of which the first defendant was surviving executor and leaving him surviving two sons plaintiff Shamji and his brother Mahadev. That plaintiff had no sons born at date of testator's death. That Mahadev attained twenty-one years on the 24th May 1901 and died on the 4th June 1902. He submitted that he was, as the manager of a co-parcenary consisting of himself and Mahadev, entitled, in the events that had happened, to the two immoveable properties, the subject of clauses 12 and 13 of his father's will, and he prayed for a declaration of title to the two properties subject to maintenance of Mahadev's widow and for possession.

He did not state that the plaintiff was in existence who would, if his contention was correct, be entitled to a share as a co-parcener in the property in suit.

He stated that Mahadev had died without issue without having adopted a son and contended that if a son were adopted the direction that the property should be given to him when he attained twenty-one was invalid according to Hindu law.

Subsequently the plaint was amended by the addition of Rama Mahadev, as a party defendant, who alleged he had been adopted to Mahadev but who, Shamji contended, had not been validly adopted.

At the hearing before Chandavarkar, J., a settlement was proposed and after the executor of Khandoji had brought the present plaintiff's existence to the notice of the Court, a consent decree was passed without adding the plaintiff as a party.

By the decree it was provided that the testator's immoveable properties should be sold and the proceeds divided in equal shares between Shamji and Rama Mahadev. It being provided that

Shamji should take his share as ancestral property and that the maintenance of Mahadev's widow at Rs. 20 per mensem should be provided for out of the share of Rama Mahadev.

This decree was passed on the 19th of January 1905.

The present suit was filed on the 22nd of August 1905 before any of the property had been sold under the consent decree.

The first question which arises for determination is whether there was in fact a consent decree consented to by a competent plaintiff, for it is contended that Shamji was in fact a lunatic at the time it was passed, for he is now a lunatic in the Ratnagiri Lunatic Asylum, whither he was sent in November 1905. Upon the evidence of Messrs. Dinsha and Gulabhbhai I hold that Shamji was not a lunatic at the date of the decree. His confinement in the Colaba Asylum some years ago and his present confinement at Ratnagiri appear to have been the result of alcoholic excesses but he was perfectly sane throughout the progress of Suit 20 of 1904.

On behalf of the fourth defendant it was contended that the existence of the consent decree to which the plaintiff's father had been a party, was sufficient to bar this suit in so far as it is sought to disturb the fourth defendant in the enjoyment of benefits secured to him by that decree. The contention is based upon the assumption that the senior member of one branch of a Hindu family is the representative of all minor co-parceners in that branch for the purpose of all litigation whether that litigation terminates in a decision of the Court after contest or in a consent decree. I can find no authority for this contention. In *Gan Savant v. Narayan Dhond*⁽¹⁾ it was pointed out by Mr. Justice West that since the enactment of section 50 of the Civil Procedure Code a plaintiff suing in a representative character must set forth and show in his plaint that he is qualified to fill it. The learned Judge goes on to say that in earlier times the same strictness of procedure did not prevail and the Hindu family was considered as a corporation whose interests were centred in the manager and that this was the practice in litigation as in other

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(1) (1888) 7 Bom. 467.

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transactions and he referred to a dictum of the Judicial Committee in *Jogendro Roy's*⁽¹⁾ case decided in 1871 as showing that the practice had been recognised and not condemned.

In the later case of *Pailmakar Vinayak v. Mahadev Krishna*⁽²⁾, Sir Charles Sargent, C. J., appears to have doubted whether Mr. Justice West had not in *Gan Savant's* case stated the rule regarding the representative character of manager of Hindu families, in the days before the Civil Procedure Code, too widely.

In the recent case of *Khierajmal v. Daim*⁽³⁾ Lord Davey delivering the judgment of the Judicial Committee after observing that the Court has no jurisdiction to sell the property of persons not parties to the proceedings or properly represented on the record said that the Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family and in refusing to disturb judicial sales on the mere ground that some members of the family who were minors were not parties to the proceedings if it appears that there was a debt justly due from the deceased and no prejudice is shown to the absent minors. It appears from the same judgment that the discretion above referred to would not be properly exercised where the interest of a minor was affected by the provisions of a consent decree to which he was not a party.

As a matter of practice suits are not filed in this Court by managers representing their minor co-parceners; the practice is to join all persons interested, but it would seem that even if on the face of the plaint there were an allegation of a sole plaintiff that he sued as manager on behalf of a co-parcenary the minor co-parcener would not be bound by the proceedings unless by judicial sale under the decree rights had been created in innocent third parties and no prejudice were shown to the absent minors.

In the present case the defendant's contention must fail first because Shamji in Suit No. 20 of 1904 did not sue or purport to sue in a representative capacity on behalf of himself and his infant son, and, secondly, because no steps have been taken under

(1) (1871) 14 M. I. A. 367 at p. 376.

(2) (1885) 10 Bom. 21.

(3) (1904) 32 Cal. 296 : 7 Bom. L. R. 1.

the decree the property in suit being still intact in the hands of the Special Commissioners.

It does not, however, follow that because the plaintiff's suit is not barred by the consent decree it is one which is necessary or justifiable in his interests. In justification of it, it is contended on behalf of the plaintiff that Rama is not the adopted son of Mahadev and that, if he is, he took no interest as a legatee under clause 13 of the will of Khandoji nor did he take as an heir on an intestacy because he was not adopted with the express authority of Mahadev in which event only could he have participated with Shamji and the plaintiff in the property not validly disposed of by the will of Khandoji.

Dealing first with the issues of fact involved in the above contentions I hold the adoption of the fourth defendant by Mahadev's widow on the 20th of May 1904 to be proved; several witnesses have deposed to it who have been unshaken in cross-examination and the only evidence adduced to discredit their story by proving that it was not possible that the ceremony could have taken place in Vittoba Chelku's Divankhana is very inconclusive. The story of the adoption is moreover supported by the letter Exhibit 8A and the agreement Exhibit J executed on or in contemplation of the adoption.

Upon the question whether or not the fourth defendant was adopted under an express authority from Mahadev the evidence is not so clear or satisfactory as that as to the factum of the adoption but I have arrived at the conclusion that the defendant Rama has proved that he was adopted under an express authority given by Mahadev to his widow shortly before his death.

The express authority which is *a priori* likely to have been given is deposed to by the witnesses Mahadeo, Bapu and Narayan who appeared to me to be respectable and intelligent men with no motive for giving false evidence.

The same fact is deposed to by Parvatibai, the adopting widow, but she is a vague and inaccurate witness whose evidence standing alone would be of little value.

Her father Khandoji in whose house the authority is said to have been given says he was present at the time but his presence

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does not appear to have been noted by any of the other witnesses. No doubt, if the authority was really given, he must have heard of it at once and may have persuaded himself that he was present at the time.

It is said, however, that Mahadeo was not in Poona in March 1902, and that, therefore, the story of the authority having been given by him in Khandoji's house at Poona must be false.

The plaintiff's Counsel on this point called Satabai, the plaintiff's aunt, now aged sixteen or seventeen, Revabai, the plaintiff's mother, Tulsabai, the neighbour of Revabai, and Chimnaji Sadashiv, the surviving executor of Khandoji Ranoji. Satabai, who must in the early part of 1902 have been twelve or thirteen years old, says that she attended to Mahadev for six months before his death and that he was in Bombay during the whole of that period and did not go to Poona in the Shimga holiday. He, however, went to Nasik a year before his death.

Revabai says Mahadev and Satabai went to Nasik six months before his death and stayed there for two months.

Tulsabai says Mahadev went to Nasik six months before his death for fifteen days and did not go to Poona three or four months before his death.

Chimnaji Sadashiv says that he does not know if Mahadev was in Bombay in March 1902 and proves that Mahadev did not receive his monthly allowance in Bombay during that month.

If the oral evidence on this point stood alone I should probably hold that the authority was proved as I do not think the evidence of the female witnesses called by the plaintiff is of any value.

There is, however, certain documentary evidence which points to the same conclusion. We have a post card (admittedly genuine) dated the 8th of March, 1902, in which Khandoji Nathuji's mother writing to him from Bombay speaks of her intention of bringing Mahadev to Poona at his own desire on the following Monday and we have the agreement of adoption dated the 20th of May, 1904, in which the recital "whereas the said Mahadev Khandoji at the time of his death gave oral directions to the said Parvatibai to adopt a son" has been

altered by the substitution of the words 'shortly before' for 'at the time of' and by the addition of the words 'at Poona.' These alterations purport to have been made at the time of execution of the document and it seems improbable that if the story of the authority is wholly false, suspicion would have been invited by an alteration of Exhibit J on this point when a false story of an authority given by Mahadev in Bombay would, if the evidence of the plaintiff's witnesses is true, have been more easy to prove than that which has been set up by the fourth defendant's witnesses.

Mr. Jinnah suggested that as Parvati and her father said Mahadev died eight days after his return to Bombay from Poona and as his death occurred in June their story must be false. But as I have already observed Parvatibai is a vague and inaccurate witness. She does, however, say that her husband returned to Bombay in Chaitra and died in the following June. The inaccuracy relied on is, in my opinion, no ground for disbelieving the defendant's witnesses.

But although the fourth defendant has no desire to disaffirm the terms settled by the consent decree his case is put higher than that of an adopted son sharing in property which had descended to Mahadev and Shamji on an intestacy. It is urged that if his full rights had been insisted on he would have been absolutely entitled under the terms of clause 13 of the will of Khandoji Ranoji and in the events which have happened to the house mentioned in that clause—a house which is admittedly far more valuable than the other house of the testator.

Clause 13 of the will is as follows:—

"As to my other property which there is, that is the property situated on the east side of the house of my step-brother I give the same to my younger son Chiranjiv Mahadev for his life. He shall have no authority either to mortgage or to sell the said property. He shall only receive the income of the said property and I give the property after his death to his son or to his sons in equal shares should there be (any such son or sons). In case he leaves no son behind him my mukhtars shall get a son adopted by his wife and thus perpetuate his name. And they shall give the said property to him on his attaining the age of 21 years."

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It is argued that the gift to a son of Mahadev adopted after the death of Mahadev was good as an executory bequest though his interest did not come into existence immediately on the determination of the prior life interest of Mahadev. Executory bequests have been recognised as valid in Hindu wills in three cases, in all of which the executory interest, so recognised, would arise if at all immediately on the termination of a prior life interest. In *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* ⁽¹⁾ the Judicial Committee held that there would be nothing against the general principles of Hindu Law in allowing a testator to give property whether by way of reward or by way of executory bequest upon an event which was to happen if at all immediately on the close of a life in being.

In *Javerbai v. Kablibai* ¹ the High Court of Bombay following *Soorjeemoney's* case upheld a power of appointment subject to the same restrictions as the Hindu testamentary law imposes on the testator himself; viz., that the appointment shall be made during the life of the tenant for life, so that the appointee might be ascertained when the event arose on which he was to take and that he should be a person alive at the death of the testator

The judgment in *Javerbai v. Kablibai* ⁽²⁾ was adopted and applied by the High Court in the case of *Bai Motivahu v. Bai Mamubai* ⁽³⁾. The last named case was taken on appeal to the Privy Council where the decision of the High Court was affirmed subject to a verbal variation in the decree. The question, whether an executory bequest, not taking effect immediately on the close of the prior life estate, would be good, did not directly arise as the interest of the possible appointee could not in that case take effect later than the close of the prior life estate but in dealing with an argument of Mr. Mayne that there would not be such a transfer of possession to the person who would take by virtue of the power as was necessary to enable it to be validly exercised, their Lordships say: "It

(1) (1862) 9 M. I. A. 123.

(2) (1891) 16 Bom. 492.

(3) (1897) 21 Bom. 709, P. C.

appears to follow from the first taker being allowed to have only a life-interest, that his possession is sufficient to complete the executory bequest which follows the gift for life."

In the present case Rama, though born in the life-time of the testator, was not an adopted son at the date of Mahadev's death and the executory bequest in favour of an adopted son could not therefore take effect immediately on the death of Mahadev, the life tenant. The case is, however, complicated by the provisions for distribution of the surplus income of the immoveable property during Shamji's life-time irrespective of the bequest under clause 13 and in the events which have happened the person entitled to $\frac{3}{4}$ of that surplus on Mahadev's death was according to the judgment of Mr. Justice Fulton, his widow till the adoption of Rama and from the date of the adoption Rama himself, the other $\frac{1}{4}$ being payable to Shamji. The beneficial interest in these houses is therefore disposed of for the present under clause 10 and when Shamji dies the executory bequest in favour of an adopted son will have been already executed by the adoption of Rama. But it is unnecessary for me to consider whether these circumstances would be sufficient to support the executory bequest in clause 13 if the fact of the death of Mahadev before the adoption of Rama was the only objection to it, as I consider the bequest in favour of a son of Mahadev who might be adopted at any time after Mahadev's death by a widow who might not have been living at the testator's decease is void under section 101 of the Indian Succession Act. I should be prepared to hold on the authority of *King v. Isaacson* ⁽¹⁾ that the interest of the adopted son would vest in him as a son on adoption notwithstanding the provision that the house should be given to him by the executors on his attaining twenty-one but it is clear that if we regard possibilities the vesting might be delayed beyond the period allowed by section 101 and it is no answer to say that the son adopted was in fact living at the death of the testator.

The result is that in my judgment the house mentioned in clause 13 subject to the provisions of clause 10 as to the

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(1) (1853) 1 Sm. & G. 371.

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distribution of income during Shamji's life-time devolved upon Shamji and Mahadev as upon an intestacy. It is conceded that they would take it as joint family property from an ancestor and that therefore the plaintiff would have an interest in it at birth. On Mahadev's death the surviving coparceners were Shamji and the plaintiff but on his adoption the fourth defendant became entitled to a moiety as representing Mahadev's branch.

The house mentioned in clause 12 would according to Mr. Justice Fulton's judgment devolve on the testator's heirs including Rama Mahadev in an uncertain event and in default would devolve on Mahadev's heirs.

Of the distributable income $\frac{3}{4}$ in the meantime would go to the fourth defendant and $\frac{1}{4}$ to Shamji.

It is clear, therefore, that the consent decree which secured to Shamji as ancestral property one moiety of the property of the testator was very beneficial to the plaintiff and if the question were merely between him and Rama I should dismiss the suit with costs on the next friend on the ground that the plaintiff has not been shown to be entitled to so much as the fourth defendant has since the consent decree always been willing to secure to him.

The lunacy of Shamji, however, makes it necessary to make some provision for the safety of the interests of the plaintiff and his father. I am informed that there is no balance of income available for distribution. I appoint Messrs. Dinsha and Gulabbhai Special Commissioners in this suit as well as in Suit 20 of 1904 to sell the property and divide the net proceeds into two equal moieties, one of which shall be paid to the fourth defendant to be held by him as provided by the consent decree. The other moiety should be applied first in payment of the costs of the executor in this suit taxed as between attorney and client, secondly in payment of the taxed party and party costs of Shamji and one day's costs of the plaintiff. The balance to be paid to the Accountant General to be invested by him in Government paper the income of which shall be applied as follows: Rs. 20 per month to Revabai for maintenance, the balance for the support of the minor and

the lunatic and such persons as the Court may hereafter from time to time order.

Next friend to pay fourth defendant's costs of suit and plaintiff's costs other than those above specifically provided for. Liberty to apply.

Attorneys for the plaintiff:—*Messrs. Captain and Vaidya.*

Attorneys for defendants:—*Mr. F. P. Pavri, Messrs. Payne & Co. and Messrs. Maganlal, Jehangir and Gulabbhai.*

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ORIGINAL CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
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BAI JAJJI AND OTHERS (ORIGINAL DEFENDANTS 6—11), APPELLANTS, v.
N. C. MACLEOD AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS
1—5), RESPONDENTS.*

1906.

January 26.

Will—"Such debts and liabilities as aforesaid"—"Such"—Construction—
Time no part of the description.

A will contained a clause providing,—

"11. As regards the remaining one equal fourth share of the said residue I direct that if at the time the said residue is divisible my son Ardeshir shall have no debts due by him or any liabilities likely to result in a debt or debts of more than Rupees five thousand the said share shall be made over to him absolutely, but if otherwise then I direct that the said share shall be held or settled by my Executors upon trust until the said Ardeshir shall be free from such debts and liabilities or until he shall die to apply the income of the same in or towards the maintenance and support of him, his wife and children or such or one or more of them the said Ardeshir, his wife and children as the trustees may at their absolute discretion determine and the education or other benefit of such children including their marriage, but when and so soon as the said Ardeshir shall be free from such debts and liabilities as aforesaid upon trust to pay the same and all unapplied income, if any, to him the said Ardeshir absolutely."

A question having arisen as to whether the expression "when and so soon as he the said Ardeshir shall be free from such debts and liabilities as aforesaid" had reference only to debts and liabilities existing at the time when the residue was divisible,

* Appeal No. 1411 of 1905 ; Suit No. 857 of 1904.

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Held, that the debts and liabilities to which the clause related were debts or any liabilities likely to result in a debt or debts of more than Rupees five thousand and it was with debts of that description that a comparison was implied by the word *such*. Time was no part of their description and reference was made to time only to indicate the event on which certain consequences were to follow according as debts and liabilities of the description indicated did or did not exist.

APPEAL from CHANDAVARKAR, J.

One Cursetji Pallonji Powalla, a Parsi inhabitant of Bombay, died at Bombay on or about the 5th October, 1889, leaving him surviving four sons, namely, Ardeshir, Jamsetji, Kaikobad and Pallonji, then a minor about thirteen years old, and six daughters, namely, Dhanbai, Sonabai, Meherbai, Bachubai, Chandanbai and Ratanbai, his only heirs according to Parsi Law. Prior to his death Cursetji made his last will and testament, dated the 16th October, 1888. Under the will the testator appointed his son-in-law, Sorabji Edulji Warden, his three adult sons and his nephew, Jamshedji Dorabji Powalla, as executors. After making provision for certain bequests and legacies to his daughters, the testator directed that the residue of his property should be divided into four equal shares and one share should be given to each of his four sons. With respect to the fourth share of Ardeshir, clause 11th of the will provided as follows:—

11. As regards the remaining one equal fourth share of the said residue I direct that if at the time the said residue is divisible my son Ardeshir shall have no debts due by him or any liabilities likely to result in a debt or debts of more than Rupees five thousand the said share shall be made over to him absolutely, but if otherwise then I direct that the said share shall be held or settled by my Executors upon trust until the said Ardeshir shall be free from such debts and liabilities or until he shall die to apply the income of the same in or towards the maintenance in support of him, his wife and children or such or one or more of them the said Ardeshir, his wife and children as the trustees may at their absolute discretion determine and the education and other benefit of such children including their marriage, but when and so soon as he the said Ardeshir shall be free from such debts and liabilities as aforesaid upon trust to pay the same and all unapplied income, if any, to him the said Ardeshir absolutely.....

Probate of the said will was granted to the executors on the 21st March, 1890, but before the grant of the probate, that is, on the 8th February, 1890, Ardeshir filed a petition in the Court for

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the relief of insolvent debtors and attached to it a schedule of his debts amounting to Rs. 58,265-14-6. On the 20th August, 1890, he obtained his personal discharge and judgment was entered up against him in the name of the Official Assignee for the amount of the scheduled debts. On the 30th January, 1895, satisfaction was entered up by the Court of Insolvency in respect of his scheduled debts. Ardeshir, however, continued to contract debts and on the 19th February, 1904, he filed a second petition of insolvency and under the vesting order his estate became vested in the Official Assignee, who, thereupon, filed the present suit for the recovery of Ardeshir's share in the residue of his father's property, alleging that by the 11th clause of his will the testator directed that Ardeshir's share should be given to him absolutely if, at the time the residue became divisible, he had no debts or liabilities of more than Rs. 5,000; but if otherwise the executors should hold his share in trust until he should become free from such debts; that the residue became divisible on the expiration of "the executor's year," that is, on the 5th October, 1890; that the debts and liabilities which existed on that date came to an end and were extinguished on the 30th January, 1895, when the Insolvents' Court entered up satisfaction in Ardeshir's favour who since that date became entitled to receive from the executors "absolutely" his share of the residue.

Defendants 1—5, executors under the will, practically supported the case of defendants 6—11, wife, daughters and sons of Ardeshir, who maintained that the suit was pre-mature because the estate of the testator had not been fully administered so as to enable any one to insist that the residue had become divisible; that even if it be assumed that the time when it became divisible was on the expiration of "the executor's year," the second condition prescribed by the testator to enable defendant 2, Ardeshir, to have his share absolutely had not been fulfilled since he, defendant 2, had all along continued indebted for more than Rs. 5,000.

The issues raised at the trial were:—

1. Whether on the 30th January, 1895, the second defendant became free of all his debts and liabilities within the meaning of the 11th clause of the will in the plaint referred to?

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2. Whether on the said date the executor-defendants held one-fourth share of the residuary estate on trust for the second defendant absolutely?

3. Whether the second defendant is now or has ever been entitled under the said will to be paid his one-fourth share of the said residuary estate?

The findings on the first two issues were in the affirmative and that on the third was, "the second defendant became entitled under the said will to be paid his one-fourth share on the 30th January, 1895, and he has since then been and is now so entitled."

On these findings the claim of the plaintiff, Official Assignee, was allowed.

Defendants 6—11, wife, daughters and sons of Ardeshir, appealed.

Setalvad (with *Jardine*) for the appellants (defendants 6—11):—The question turns on the construction of the 11th clause of the will. That clause contains the words "such debts and liabilities, &c.," and the question is what does the word "such" refer to. We contend that it refers to debts and liabilities of more than Rs. 5,000 mentioned in the clause and not to the time when the residue became divisible. It is not correct to say that the word "such" in this particular clause refers to the time when the residue became divisible. The lower Court based its judgment on the ground that the word "such" occurring in the other clauses of the will relates to time and that, therefore, the testator intended to use the word in one and the same sense throughout the will. The word "such" is not a technical word and so it cannot be construed with reference to its use in the other parts of the will. A reference to the other clauses of the will will clearly show that in those clauses the word cannot but refer to time and nothing else.

Dwar for respondents 2—6 (defendants 1—5, executors):—We support the appellants' contention. The will should be construed with reference to the intention of the testator who was a Parsi and who intended to provide for his sons. He was perfectly aware that one of his sons had incurred liabilities and was anxious that his money should not go to the creditors of that son. He, therefore, devised in favour of his three sons absolutely

and created a trust with reference to the one in pecuniary troubles to enure to that son's wife and children. It is of no consequence whether that son incurred debts for a reasonable or an unreasonable purpose. It was the desire of the testator that his money should not be claimed by the creditors of his son and that his grandchildren should not starve. If the construction put by the lower Court be upheld that predominant intention of the testator would be entirely defeated because there is nothing to prevent the son from contracting fresh debts and then claiming from the executors his share absolutely to pay up his fresh creditors. In this way the son can wholly undo the wishes of his father.

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Lowndes (with *Raikes*, acting Advocate General and *Inverarity*) for respondent 1 (plaintiff):—The conclusion arrived at by the lower Court is correct. We do not support that conclusion on the grounds given in the judgment. We do not contend that the term "such" should be construed with reference to its use in the other clauses of the will. The will was written in English and its draft was settled by Mr. Latham, one of the best conveyancers we ever had. It must, therefore, be construed in its grammatical sense, when it is so construed, the conclusion arrived at by the lower Court is correct.

JENKINS, C. J.:—The only question arising on this appeal is whether the defendant Ardeshir Cursetji Powalla acquired under his father's will an interest, which vested on his insolvency in the Official Assignee.

The testator by the 10th clause of his will directed that all the rest residue and remainder of his property should be divided into four equal shares; that one such share should be given to each of his sons, the 3rd and 4th defendants: and that another share should be held in trust to pay the income thereof to his son Pallonji Cursetji Powalla until he should attain the age of 21 years, and on his attaining that age in trust to pay the share to him absolutely.

By the 11th clause of his will the testator directed as follows:—

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"11. As regards the remaining one equal fourth share of the said residue I direct that if at the time the said residue is divisible my son Ardeshir shall have no debts due by him or any liabilities likely to result in a debt or debts of more than Rupees Five thousand the said share shall be made over to him absolutely, but if otherwise then I direct that the said share shall be held or settled by my Executors upon trust until the said Ardeshir shall be free from such debts and liabilities or until he shall die to apply the income of the same in or towards the maintenance and support of him, his wife and children or such or one or more of them the said Ardeshir, his wife and children as the trustees may at their absolute discretion determine and the education and other benefit of such children including their marriage but when and so soon as he the said Ardeshir shall be free from such debts and liabilities as aforesaid upon trust to pay the same and all unapplied income if any to him the said Ardeshir absolutely . . ."

On the 5th October, 1889, the testator died.

On the 8th of February, 1890, the defendant Ardeshir filed his petition for relief under the Insolvent Debtors Act, and on the 20th of August, 1890, judgment was entered up against him in the name of the Official Assignee for Rs. 58,265-14-6, the amount of his scheduled debts.

On the 30th of January, 1895, it was ordered that satisfaction be entered up on the judgment, and that the Official Assignee should deliver over to the defendant Ardeshir the balance of moneys, property, books of account, papers, documents, &c., relating to his dealings and transactions, if any, in the Official Assignee's possession, or subject to his control, and it was further ordered that the same be vested in the defendant Ardeshir.

Notwithstanding these Insolvency proceedings and the entry of satisfaction, it is common ground that the defendant Ardeshir still continued to have debts due by him of more than Rs. 5,000, and at no time has he been free from indebtedness to that extent.

It is in these circumstances that the question involved in this appeal arises:—the Official Assignee contends that the debts and liabilities, to which the 11th clause refers, are only those in existence at the time the residue was divisible: the appellants, who are Ardeshir's wife and children, contend that the clause must not be read in this limited sense.

Though it was argued before Chandavarkar, J., that the residue would not be divisible until the whole estate had been realized,

this point was abandoned before us, and the only question discussed has been whether the trust in Ardeshir's favour "when and so soon as he the said Ardeshir shall be free from such debts and liabilities as aforesaid" has reference only to debts and liabilities existing at the time when the residue was divisible, for if not, then admittedly the trust in favour of Ardeshir has not arisen and the Official Assignee is not entitled to the share he claims.

Chandavarkar, J., decided in the Official Assignee's favour: "such debts and liabilities" in his opinion mean such as existed when the residue became divisible.

But he was led to this conclusion by the sense in which he thought the word *such* had been used in other parts of the will. The extent to which this consideration influenced the learned Judge in rejecting the defendant's contention appears from that part of his judgment where he says, "If in the will this had been the only use of the word 'such' I should have allowed that contention."

Mr. Lowndes, however, has sought to support the conclusion wholly on other grounds: he has argued that the antecedent to such debts and liabilities is to be found in an expansion of the words "but if otherwise." If that which is involved in them is expressed, then, according to his argument, the antecedent will be found to be debts and liabilities existing when the residue becomes divisible.

Is this the true construction of the testator's will? If so, then it was within Ardeshir's power to defeat the testator's scheme at any time, by the simple expedient of discharging the debts and liabilities existing at that point of time by borrowing money or creating substituted liabilities for that purpose. But in my opinion, the view, for which Mr. Lowndes contends, cannot be accepted. The debts and liabilities of Ardeshir to which clause 11 relates are "debts due by him or any liabilities likely to result in a debt or debts of more than Rupees five thousand," and it is, I think, with debts of that description that a comparison is implied by the use of the word *such*. Time (in my opinion) is no part of their description; it is extraneous to

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it, and the reference to time is made only to indicate the event on which certain consequences are to follow according as debts and liabilities of the description indicated do or do not exist.

The point does not admit of elaboration, and is one which would strike different minds in different ways. And though I naturally hesitate to differ from so careful a Judge as Chandavarkar, J., this is the conclusion to which I come.

The result then is that the decree of the first Court must be reversed and the suit dismissed. The cost of all parties throughout will come out of the residue, those of the executors as between attorney and client.

Decree reversed.

Attorneys for appellants:—*Messrs. Unwalla & Pherozshaw.*

Attorneys for respondents:—*Mr. K. D. Shroff, and Messrs. Ardeshir, Hormusji, Dinshaw & Co.*

G. B. E.

ORIGINAL CIVIL.

Before Mr. Justice Batchelor.

EMMA AGNES SMITH, PLAINTIFF, v. THOMAS MASSEY AND
OTHERS, DEFENDANTS.*

1906.

February 26.

Indian Succession Act (X of 1865), sections 20, 22, 105—Relationships contemplated by the Act are legitimate relationships only—Gift by will of the residue to such charities as the trustees may think deserving, is good.

The Indian Succession Act (X of 1865) contemplates only those relationships which the law recognizes, that is, those flowing from a lawful wedlock.

The gift, by will, of the residue to "such charities as the trustees may think deserving" is a good gift, the objects being wholly charitable.

ORIGINATING SUMMONS.

This summons was taken out by Emma Agnes Smith, executrix of the will of one Mary Anne Houghland.

Mary Anne Houghland died at Bombay on or about the 22nd of August, 1905, leaving her surviving one Thomas Massey, son of her sister Georgiana Massey.

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On the 21st August, 1905, Mary Anne Houghland made her will. She appointed the plaintiff and Margaret Connell as executrices of the will. The plaintiff took out its probate on the 4th October, 1905.

Mary Anne Houghland and her elder sister Georgiana were the illegitimate daughters of one Captain Dallas, an Englishman and a Captain in the 3rd Native Cavalry, by a native woman, a Mahomedan or a Kamatee by caste, and were born about the years 1840 and 1836, respectively. The two sisters were some time after their birth baptised as Christians and they subsequently adopted European dress, habits, manners and mode of life.

Georgiana was married to Henry Massey in 1855. She died in 1858 leaving her surviving her son Thomas Massey (defendant).

Mary Anne married John Charles Houghland in 1865. John Charles Houghland died in 1895, leaving him surviving Mary Anne Houghland and no next-of-kin. She died in 1905. By her will she bequeathed certain pecuniary and other legacies to the children of Thomas Massey and to certain other persons.

The will also contained (amongst other) the following provisions :—

(1) A sum of Rs 300 to the Bombay Christian Burial Board for the purpose of keeping decently and in good order in perpetuity the grave of the testatrix's late husband John Charles Houghland.

(b) Rs. 10,000 to the community known as the Sisters of All Saints at Mazagaon.

(c) Rs. 500 to the Bombay Educational Society's Schools, Byculla.

(d) Rs. 500 to the Church Missionary Society's Church at Girgaon.

Mary Anne Houghland by her will further directed the remainder of her estate to be divided among such charities as her executrices should think deserving.

On the 5th December, 1905, the plaintiff took out an originating summons for the determination of the following questions :—

1. Whether Thomas Massey is the nephew of the deceased Mary Anne Houghland?

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2. If he be the nephew, whether the bequests to the community known as the All Saints Sisters, the Educational Society's Schools, Byeulla, and the Church Missionary Society's Church, Girgaon, are valid?

3. Whether the direction in the will to divide the remainder of the estate among such charities as the executrices think deserving is valid?

4. Whether the bequest to the Burial Board, Bombay, is valid?

The summons was argued before Batchelor, J.

Strangman, for plaintiff.

Bahadurji, for defendant 1.

Lowndes, for defendant 3.

Raikes (acting Advocate General), for defendant 6.

Bahadurji for defendant 1:—The Indian Succession Act (X of 1865) applies to the testatrix, as she was Christian by religion, though born of a Hindu or Mahomedan mother and a European father. To ascertain her kindred, who would be entitled on intestacy, we have to find the nearest connection descended from a common ancestor (section 20), whether on the father's or mother's side (section 23). And section 8 of the Act shows that the Act is applicable to illegitimate as well as legitimate testators: see also the Oudh Estates Act I of 1869. The Succession Act varies and departs to some extent from the principles of English Law: see the remarks of the Privy Council in *Kurrukulain Bahadur v. Nuzbat-ud-Dowla* ⁽¹⁾. The defendant No. 1 is therefore a nephew of the testatrix and section 105 of the Indian Succession Act applies to the testatrix's will.

[*Lowndes*:—A bastard in the eye of the law is *nullius filius*. Therefore the testatrix and Georgiana could not have inherited *inter se*: if so, how could their descendants. The testatrix and Georgiana are not sisters in the eye of the law, therefore, Thomas Massey, Georgiana's son, is not a nephew of the testatrix and section 105 of the Succession Act cannot therefore apply. There has been no case on the point since 1865, the year in which the Succession Act was enacted. Further, English law refuses to follow Civil Law when it says that subsequent marriage legitimizes offsprings previously born. The Oudh Estates Act I

(1) (1905) 33 Cal. 116; 7 Bom. L. R. 876.

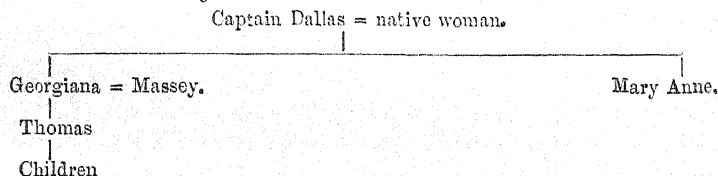
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of 1869 cannot help to a construction of the Succession Act, as the former is later in date. Section 105 of the Succession Act does not apply at all, as in this case there is no gift for religious or charitable uses. There is merely a gift to a number of people sued under section 30 so far as my clients are concerned. The community may divide the money among themselves.

Raikes and Strangman submitted to the order of the Court.

BACHELOR, J.:—This originating summons was taken out for the determination of certain questions arising upon the will of one Mary Anne Houghland, a Eurasian. The facts are admitted to be as stated in the plaint, and the relation between the parties is shown in the subjoined tree :



The only questions argued are those numbered (1), (2) and (3) ; and they all turn upon the question whether Thomas Massey is the nephew of the testatrix, Mary Anne, within the meaning of the Indian Succession Act, which admittedly is the law applicable to the parties. The will was made only a day before the testatrix's death, so that, under section 105 of the Act, Thomas Massey, if he is the nephew of Mary Anne, would bar bequests to religious and charitable uses. That is the claim which Thomas now prefers, but the difficulty in his way is that his mother Georgiana and Mary Anne were illegitimate daughters of Captain Dallas by a native woman, of whom nothing further is known beyond that she was a Mahomedan or else a Kamati. At first sight it would appear that Georgiana and Mary Anne being in the eye of the law *filie nullius*, they were not sisters, and Thomas's claim to be regarded as Mary Anne's nephew must consequently be rejected. That was the view which seemed to me quite clear during the argument, but, since apparently simple cases frequently conceal real difficulties, I adjourned the judgment till to-day in order to see whether Mr. Bahadurji's argument for Thomas might not prove to be more substantial than it seemed. But, in the result, I remain of the same opinion.

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Mr. Bahadurji has cited sections 20 and 22 of the Act, pointing out that there are no words limiting the relations contemplated to relations by legitimacy. But it appears to me that this consideration is really decisive against Thomas's claim. The Act is an English Act, and, as Mr. Lowndes has observed, must be read as part of a system of law which has refused to follow even the Civil law in its relative tenderness towards illegitimate children. Since the Act speaks of certain relations, without more, I infer that the only relations contemplated are those which the law recognizes. There can be no doubt that in an English Act of Parliament the word "child" always applies exclusively to a legitimate child: see per Pollock C. B. in *Dickinson v. N. E. Railway Co.*⁽¹⁾, per Cotton L. J. in *Guardians of Northwich Union v. Guardians of St. Pancras Union*⁽²⁾. No doubt the Act is applicable to others than persons of exclusively English descent, but these sections are not extended to Hindus, and for my own part I cannot conceive that such an Act as this which defines certain relations *simpliciter*, intended any other relations than those flowing from lawful wedlock. If the argument were conceded, a bastard would share equally with a son—i. e. a legitimate son, he being the only son known to our law—and this result appears to me wholly repugnant and impossible. I observe also that though the Act has been in operation for forty years, it is not suggested that the present contention receives any countenance in the reports.

Then it was said that the absence of distinction between legitimate and illegitimate relations in the Act makes in Thomas's favour because in the Oudh Estates Act I of 1869 there is a special provision directing that words expressing relationship denote only legitimate relationship, but it is impossible to construe the Succession Act by another Act passed many years later and possibly *diverso intuitu*.

I have no wish to labour a point which, I confess, appears to me to be too plain for much argument, but if any doubt should remain, reference may be made to section 87 of the Act. This section enacts that in the construction of a will words expressing relationship ordinarily denote only legitimate relationship,

(1) (1863) 12 W. R. 52 (Eng.).

(2) (1885) 22 Q. B. D. 164.

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though, where there is no legitimate relative, they will include an illegitimate relative, who has acquired the reputation of being the relative in question. That of course is a well-known doctrine of English law, and may be found illustrated in such cases as *Seale-Hayne v. Jodrell*⁽¹⁾. But section 87 would be misleading surplusage if the whole scheme of the Act contemplated legitimate and illegitimate relatives indifferently. I must find, therefore, that Thomas Massey is not the nephew of the testatrix, and cannot take advantage of section 105 of the Act.

That being so, it is unnecessary to pronounce upon Mr. Lowndes's other argument that the gift to the "All Saints Sisters at Mazagaon" is a gift to individuals and not a gift to religious or charitable uses. The gift is actually to the "Community known as the All Saints Sisters at Mazagaon", and, if I had to decide the point, I should hold it to be a gift to charity, having regard to the words used and to the other similar dispositions in the will.

The gift of the residue to "such charities as the Trustees may think deserving" is, I think, a good gift, the objects being wholly charitable: see *Moggridge v. Thackwell*⁽²⁾.

There has been no argument as to the gift of Rs. 300 to "The Burial Board, Bombay," for the purpose of keeping in good order in perpetuity the grave of the testatrix's husband, but in the absence of objection, I think the gift may stand. Apart from the constitution and objects of the "Burial Board," upon which there is no evidence, the disposition may be regarded as the settlement of the price to be paid for a certain continuous service which the Burial Board will presumably contract to render.

The answers to the questions will therefore be :—

- | | |
|----------------------|-----------|
| (1) No ; | (3) Yes ; |
| (2) Does not arise ; | (4) Yes. |

As to costs, the first defendant must pay his own costs : other costs may come out of the estate, those of the plaintiff and of the Advocate General as between attorney and client.

Attorneys for the plaintiff: *Messrs. Smetham, Byrne and Noble.*

R. R.

(1) [1891] A. C. 304.

(2) (1893) 7 Ves. 36.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Aston.*

1906.
March 13.

LAKSHMAN SADASHIV SHET REDIZ (ORIGINAL SURETY, DEFENDANT
No. 4), APPLICANT, v. GOPAL ANNAJI KARGUPIKAR AND ANOTHER
(ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Civil Procedure Code (Act XIV of 1882), section 253—Decree against
Surety—Execution against Surety—Practice and Procedure.*

The provisions of section 253 of the Civil Procedure Code (Act XIV of 1882) do not permit the execution of a decree against the surety, who has become liable for the performance of the decree passed prior to his entering into the obligation.

Venkapa Naik v. Basalingapa⁽¹⁾ explained.

SECOND appeal from the decision of M. P. Khareghat, District Judge of Ratnágiri, confirming the decree passed by Mahadeo Shridhar, First Class Subordinate Judge at Ratnágiri.

This was an application to execute a decree against a surety under section 253 of the Civil Procedure Code (Act XIV of 1882).

The appellant became a surety for the original defendant for the due performance of the decree by the latter. This was after the date of the decree.

The decree-holder then, in execution of the original decree, proceeded against the surety.

The Court of first instance ordered execution to issue against the surety.

Against this decision, the surety appealed to the lower appellate Court. One of his contentions there was the decree-holder could not proceed against him by way of execution but must file a separate suit. The learned Judge overruled this contention and confirmed the order passed by the Subordinate Judge.

The surety appealed to the High Court.

H. C. Coyaji, for the appellant.

G. S. Rao, for the respondents.

* Second Appeal No. 754 of 1905.

(1) 1887) 12 Bom. 411.

JENKINS, C. J.:—This appeal arises out of an application for the execution of a decree against a surety under section 258 of the Civil Procedure Code.

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LAKSHMAN
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In order to accede to the argument advanced before us by the respondents in support of the decree passed in their favour in the lower Court, we must read in section 253 the word "before" as being equivalent to "before or after."

There are decisions of this Court, and in particular I refer to that in *Venkappa Naik v. Baslingappa*⁽¹⁾ where it has been determined that certain words in that section are superfluous. But I do not feel at liberty to introduce into the section the words necessary for the success of the respondents' argument. The case of *Venkappa Naik v. Baslingappa*⁽¹⁾ has been relied on both before us and in the lower Court. It was in effect there said that the words "in an original suit" were superfluous. How far that opinion was justified I need not discuss, but it is erroneous to suppose that there is any warrant in that decision for treating as superfluous not only the words "in an original suit," but also the words "before the passing of the decree." These last words are kept intact by that decision.

Here the surety has become liable, if at all, for the performance of a decree passed prior to his entering into this obligation. So that I come back to my original difficulty that we cannot read "before" as equivalent to "before or after."

For these reasons the decision of the lower appellate Court appears to me to be erroneous, for (in my opinion) the Court had not jurisdiction to proceed under section 253 by way of execution. It may be that there is a remedy against the appellant, but it is not that which has been adopted.

The result, therefore, is that I would reverse the decree and dismiss the application with costs throughout.

ASTON, J.:—I also am of opinion that the Court had not jurisdiction under section 253 of the Civil Procedure Code to proceed in execution-proceedings taken in execution of the original decree against the surety in this case, and concur in the order proposed.

Decree reversed.

R. R.

(1) (1887) 12 Bom. 411.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batty.*

1906.
March 23.

BHAVANISHANKAR RAMRAO AND OTHERS (ORIGINAL DEFENDANTS 2—5 AND 7—9), APPELLANTS, v. TIMMANNA RAM BHATTA (ORIGINAL PLAINTIFF), RESPONDENT.*

Devasthan Committee—Powers of appointment and dismissal of Moktesars—Powers exercisable in the interests of the Devasthan—Dismissal of Moktesar—Good and sufficient cause—Burden of proof.

The powers of appointment and dismissal of Moktesars with which a Devasthan Committee are vested are exercisable not in their own interests, but in the interests and on behalf of the Devasthan, of which they are trustees. They are not at liberty to appoint or dismiss arbitrarily, capriciously or for private reasons of their own, but only on grounds justified by the interests of the institution.

When a Moktesar is dismissed by a Devasthan Committee, the burden of proof is on him to show that the Committee did not act on a *bona fide* belief that the dismissal was necessary in the interests of the Devasthan, but had been actuated by some other improper motive.

SECOND appeal from the decision of C. Roper, District Judge of Kánara, reversing the decree of B. R. Mehendale, Additional Subordinate Judge of Honavar.

The plaintiff sued for a declaration that the appointment of defendants 10—15 as Moktesars of the Murdeshvar Matabar Devasthan in the Honavar Taluq was illegal and that the plaintiff along with one Venkatraman Bhat and defendant 16 was entitled to the office of Moktesar. The plaint alleged as follows:—

Defendants 1—9 were appointed, under the Religious Endowment Act (XX of 1863), members of the Temple Committee for the Honavar Taluq. The plaintiff had been, from the time of his ancestors, in the enjoyment of the office of worshipper and Moktesar and was to continue hereditarily from generation to generation. The plaintiff had been accordingly discharging his duties properly along with two other Moktesars, namely, the said Venkatraman Bhat and defendant 16. Defendants 5—8 without any authority in that behalf, without any cause and

* Second Appeal No. 542 of 1905.

without plaintiff's knowledge gave him a notice on the 17th April 1901 that he and Venkatraman were removed from the office of Moktesars and that the charge of the office should be given to defendants 10—15 who were appointed Moktesars instead. The notice reached the plaintiff on the 21st May 1901. The dismissal of the plaintiff and the appointment of defendants 10—15 were illegal. The defendants were acting in collusion, out of hatred towards the plaintiff, for bringing him into discredit and for depriving him of his permanent rights. The plaintiff was, therefore, entitled to be restored to his office of Moktesar.

Defendants 2--8 replied *inter alia* :—The Court had no jurisdiction to entertain the suit. The defendants did not bear hatred towards the plaintiff, they had no cause to do so and were not acting in collusion. The plaintiff and Venkatraman did not look to the management of the Devasthan according to law and according to the Sanad of their appointment. They did not submit accounts to the Temple Committee in accordance with the Religious Endowment Act (XX of 1863) though a written notice was given to them. Many complaints were made against the plaintiff by the local public to the defendants and the temple property suffered considerable loss during the plaintiff's management and would have continued to do so if the plaintiff had been allowed to remain in the office. For all these reasons the plaintiff was dismissed but not for any hatred. The temple was a public one and the plaintiff had no right to call into question the appointment of defendants 10—15 along with defendant 16 as Moktesars of the temple.

Defendant 9 replied :—The office of Moktesar was not hereditary as alleged by the plaintiff. The appointment was originally made by the Committee and when it was found that the plaintiff did not discharge his duties properly, the Committee dismissed him. The suit was opposed to sections 14 and 18 of the Religious Endowment Act (XX of 1863).

Defendants 10—15 added :—The suit was opposed to sections 44 and 45 of the Civil Procedure Code (Act XIV of 1882) and the plaintiff managed the trust property to his own profit and to the loss of the temple.

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The Subordinate Judge found that the Court had no jurisdiction to try the suit, that it was not maintainable unless leave was obtained under section 18 of the Religious Endowment Act (XX of 1863), that the provisions of the said Act applied to the temple in suit, that the plaintiff was properly dismissed and that the suit for a declaration only was maintainable. He, therefore, dismissed the suit.

On appeal by the plaintiff the Judge held that the Subordinate Judge had jurisdiction to try the suit and that he was wrong in holding that the plaintiff was rightly dismissed from his post of Moktesar of the temple. The Judge, therefore, reversed the decree and declared the plaintiff's dismissal from his office as Moktesar of the Murdeshvar temple as void. As for the other reliefs claimed the Judge was of opinion that they could not be granted since Venkatraman Bhat and defendant 16 were not co-plaintiffs and no case was made out that the appointments of defendants 10—15 were invalid. He, therefore, granted relief with respect to the plaintiff's personal claim only. On the merits the Judge observed as follows :—

As to the merits I am of opinion that the lower Court's finding cannot possibly be sanctioned, and in support of this opinion I largely rely on the lower Court's own judgment, although of course independently of what it contains. I am satisfied from the record that there was no just cause for the appellant's dismissal. The Judge says towards the end of his judgment "As I do not, however, hold that they (Temple Committee) have been actuated by *malâ fides* I see no reason to disturb the resolution (of dismissal) which, though it rests on very slender foundation, indeed, is technically right." There are other passages in his discussion on this issue which show that the Judge was satisfied that the appellant had been treated unfairly.

* * * * *

The present case has peculiar circumstances of its own, which favour the appellant. He is a man of 49, quite illiterate, has been Moktesar since he was 14, and his elder brother, father and grandfather were Moktesars before him. He is a Havig, and the Judge of the Court below allows that there is bad feeling between Havigs and Saraswats. I think the majority of the Temple Committee are Saraswats, even if they all are not, as the Judge points out. The judgment by Mr. MacGregor, Magistrate, First Class, has been exhibited as exhibit 61. He refers to this caste-enmity. In that case the appellant was prosecuted for criminal breach of trust and discharged for the reason that the complaint against him was groundless. Now I come to the circumstances which led to the dismissal. Defalcations were vaguely alleged, but not a vestige of

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proof is forthcoming. Moreover, it is clear that any errors in the accounts could not be brought home to the appellant, who cannot read or write. The only charge which has the smallest proof to support it is that appellant failed to hand over the accounts of past years. The Subordinate Judge says, and it is admitted that the then current year's accounts were examined on inspection and found correct, and the appellant's version of what occurred when he was called upon to produce the past years' accounts is perfectly credible and confirmed by exhibit 55, the statement admitted to have been made by appellant and a co Moktesar at that time before some members of the Temple Committee. I cannot see that there were even technical grounds for the resolution of the dismissal, and most certainly there was no good or just cause for it. The onus of proof appears to have been laid wholly upon the appellant, but in a case of this nature when the plaintiff has produced evidence tending to show that he was dismissed without good cause, and the dismissal is admitted by the defendants, I think that it lies upon them to prove that there was good cause. This they have certainly not done. The Temple Committees generally in this part of the world have not the reputation of being highly scrupulous in matters of this kind and it would be grossly unfair that a man who for many years had served the temple (and his father and grandfather before him) should be suddenly dismissed without good reason. The Shambhog of the temple must have had the accounts as he wrote them.

Defendants 2—5 and 7—9 preferred a second appeal.

Nilkanth Atmaram for the appellants (defendants 2—5 and 7—9):—The view taken by the Judge on the question of jurisdiction is correct, but we contend that he was wrong in holding that the members of the Temple Committee were bound to show good and sufficient cause for the plaintiff's dismissal and that they have not done so. The Judge has found as a fact that the Temple Committee appointed the plaintiff as Moktesar. (A Moktesar is an agent, a deputy, a commissioner, see Wilson's Dictionary of Marathi Terms.) A Moktesar is only an agent or a deputy appointed by the Temple Committee. Therefore the relationship that exists between a Moktesar and the Temple Committee is that of servant and master, respectively. The Committee appointed the plaintiff, therefore, they can dismiss him at any time unless they are precluded by the terms of the deed of appointment. It cannot be presumed that the appointment when once made is made for life. Nobody can deny that a master can dismiss his servant at his pleasure.

Before the Religious Endowment Act was passed the Crown had absolute control over religious endowments: *Seshadri Ayyan-*

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gar v. Nataraja Ayyar⁽¹⁾. Under the Religious Endowment Act, the Temple Committee became vested with all the rights of the Sovereign power and the affairs of the temple are managed by the agents appointed by the Committee. If, by a resolution properly passed, the Committee dismisses a servant whom they have appointed, the Court has no power to set aside the dismissal. It is nowhere suggested that the resolution dismissing the plaintiff was not properly passed. Therefore the finding of the Judge that the dismissal was not for sufficient cause goes beyond the pleadings in the case. The Judge has relied on *Seshadri Ayyangar v. Nataraja Ayyar*⁽¹⁾ and *Chinna Rangaiyengar v. Subbraya Mudali*⁽²⁾. The first case is not applicable because the appointment therein was permanent and it is not clear whether in the second also the appointment was not permanent.

Even assuming that we were bound to prove good and sufficient cause for plaintiff's dismissal, we submit that the first Court has referred to certain circumstances which clearly show that there was good and sufficient cause. The Judge has omitted to notice those circumstances.

S. S. Patkar for the respondent (plaintiff):—It was argued that the Judge was wrong in holding that the members of the Temple Committee were bound to show sufficient cause for the dismissal of the plaintiff. The Religious Endowment Act deals with two kinds of trustees, managers and superintendents of religious establishments, namely, (1) trustee, manager or superintendent under section 3 whose nomination is vested in or exercised by Government or public officer, or is subject to confirmation by Government or public officer, and (2) trustee, manager or superintendent under section 4 whose nomination is neither so vested, nor liable to such confirmation. Under section 4 Government transfers to the trustees, managers or superintendents all the property and all the powers exercisable by the board or local agent are exercisable by such trustee, manager or superintendent to whom such transfer is made. In the case of trustee, &c., under section 3, the Temple Committee is appointed under section 7 and such Committee can perform the duties of the board or local agent. In the present case the plaintiff is the

(1) (1897) 21 Mad. 179.

(2) (1867) 3 Mad. H. C. R. 334.

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Moktesar of the temple, that is, the superintendent of the temple under section 3 of the Act. He is, therefore, not the servant of the Temple Committee and they cannot dismiss him arbitrarily, capriciously or without good cause. The ruling in *Seshadri Ayyangar v. Nataraja Ayyar*⁽¹⁾ describes the position of a trustee or manager of a religious endowment governed by the Religious Endowment Act. A committee would not be justified in dismissing a Moktesar for what it considers to be a misconduct. The misconduct must be such as would be held to be so by a Court of Equity. The ruling in *Chinna Rangaiyangar v. Subbraya Mudali*⁽²⁾ which is followed in *Seshadri Ayyangar v. Nataraja Ayyar*⁽³⁾ lays down that the power of dismissal can be exercised by the Committee on good and sufficient grounds. In the present case the Judge has found as a fact that there was no just cause for the plaintiff's dismissal. Both the lower Courts have found that vague allegations were made against the plaintiff which were not even attempted to be proved. The Judge has found that the plaintiff is a Havig and the majority of the members of the Temple Committee are Saraswats, and there is bad feeling between Havigs and Saraswats. It is unfair that the plaintiff should be summarily dismissed without good cause, especially as he, his father and grandfather had rendered service to the temple. The finding of the Judge that the plaintiff's dismissal was without good cause is a finding of fact which must be accepted in second appeal. The fact that other Moktesars have been appointed is immaterial, *Chinna Rangaiyangar v. Subbraya Mudali*⁽⁴⁾.

JENKINS, C. J.:—The plaintiff sued to obtain a declaration that the appointment of defendants 10 to 15 as Moktesars of a certain Devasthan was illegal, and that the plaintiff is entitled to the office of Moktesar of that Devasthan.

The Court of first instance held that the suit was not maintainable without leave obtained under section 18 of Act XX of 1833, and that the plaintiff had been properly dismissed by the defendants 1 to 9, who constitute the Committee of the Temple.

(1) (1897) 21 Mad. 179 at p. 219.

(2) (1897) 3 Mad. H. C. R. 331.

(3) (1897) 21 Mad. 179.

(4) (1898) 3 Mad. H. C. R. 338.

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The lower appellate Court held that the suit did not fall within section 14 of the Act; that leave under section 18 was unnecessary; that the defendants 1 to 9 could not dismiss the plaintiff from office without good and sufficient cause, and that no good and sufficient cause for dismissal had existed. The lower appellate Court reversed the decree of the Court of first instance and declared the dismissal of the plaintiff to be void, but held that no case had been made out for declaring the appointments of defendants 10 to 15 invalid.

The defendants 2 to 5 and 7 to 9, the Committee of the Temple, appealed against that decree.

The objection as to the jurisdiction of the Court of first instance has not been pressed. But it is urged for the appellants that, inasmuch as it has not been held that the plaintiff was a hereditary Moktesar, the plaintiff cannot dispute the right of the defendant-Committee to dismiss him at their absolute discretion, or on mere matter of suspicion, without assigning or establishing their reasons for so doing. The cases of *Seshadri Ayyangar v. Nataraja Ayyar* ⁽¹⁾ and *Chinna v. Subbraya* ⁽²⁾ were relied on by the lower appellate Court. The appellants contend, those cases relate to the dismissal of persons appointed as permanent officers, and, therefore, do not apply; and that as the plaintiff was appointed by the Committee, the relation in which the parties stand to each other is that of master and servant.

We think this contention untenable; for the powers of appointment and dismissal with which the defendants as a Committee were vested, were exerciseable not in their own interests, but in the interests and on behalf of the Devasthan, whereof they were trustees. They were, therefore, not at liberty to appoint or dismiss arbitrarily, capriciously, or for private reasons of their own, but only on grounds justified by the interests of the institution. The appointment of the plaintiff by the Committee, therefore, implied that his tenure of office was to continue so long as its continuance was not inconsistent with the interests of the Devasthan. No doubt it was for the

(1) (1897) 21 Mad. 179.

(2) (1867) 3 Mad. H. C. R. 334.

Committee to exercise their own judgment as to whether those interests were impaired by the plaintiff's continuance in office. And having regard to the case of *Hayman v. Governors of Rugby School* ⁽¹⁾ we think the onus was, as the Court of first instance placed it, on the plaintiff to show that the defendant-Committee had not, in dismissing him, acted on a *bond fide* belief that the dismissal was necessary in the interests of the Devasthan, but had been actuated by some other and improper motive. But the finding of the lower appellate Court is, we think, in effect, that the Committee did act without any real regard to the interests of the Devasthan and were actuated by the bad feeling and caste enmity which, the lower appellate Court holds, the majority of the Committee entertain as Saraswats towards the Havig community, of which the plaintiff is a member.

This we think, is a finding of fact which is binding in second appeal.

The decree of the lower Court must, therefore, be confirmed. The appellants must bear all costs of this appeal.

G. B. R.

Decree confirmed.

(1) (1874) L. R. 18 Eq. 28.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

R. S. WOONWALLA AND COMPANY (APPELLANTS) *v.* N. C. MACLEOD
AND ANOTHER (RESPONDENTS).*

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March 26.

Indian Insolvency Act (11 and 12 Vict., c. 21), section 31—Sale by Official Assignee—Sanction of the Court—Power of Court to set aside a completed sale.

Under the Indian Insolvent Act the Official Assignee has full power to sell the property and effects of an insolvent, and it is his duty to make sale of the same with all convenient speed. The sanction of the Court to the sale is not necessary.

Section 31 of the Indian Insolvent Act does not vest the Court with power to set aside completed sale.

* Appeal No. 1417.

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APPEAL from the judgment of Chandavarkar, J., on a rule *Nisi* dated 9th September 1905.

The facts on which the rule was argued were as follows:—
Two persons Bhukandas Laliubhai and Hargovandas Ichharam, representing the firm of Lallubhai Mulchand, were, at the instance of one Vassonji Trikamji, adjudicated insolvents on or about the 19th June 1901.

The appellants R. S. Woonwalla and Company were one of the creditors of the firm of Lallubhai Mulchand to the extent of Rs. 3,652-1-5.

The recoverable assets of the firm of Lallubhai Mulchand consisted of a mortgage in their favour of two lakhs of rupees on the property of the Hope Mills, Limited.

On the 10th April 1905, the right, title and interest of the insolvents in the mortgage-debt was agreed to be sold to one Ebrahim Rahimtulla for Rs. 8,000 subject to the sanction of the Court. On the same day, Mr. Premchand Roychand submitted to the Official Assignee an offer for Rs. 10,500. At this Mr. Ebrahim expressed his readiness to increase his offer to Rs. 10,500.

On the 14th April 1905, the matter was by the Official Assignee brought to the notice of the Commissioner in Insolvency, who ordered that the Official Assignee should be at liberty to sell the property to the highest bidder after it was put to auction between Ebrahim Rahimtoolla and Premchand Roychand.

The same day the property was put to auction and it was knocked down to Ebrahim Rahimtoolla for Rs. 13,100.

On the 27th June 1905, the Official Assignee executed a deed of assignment in Mr. Ebrahim's favour.

On the 6th September 1905, R. S. Woonwalla and Company applied to the Commissioner in Insolvency to set aside the sale and obtained a rule "to show cause why the order made in this matter upon the 14th April 1905 and the sale made in pursuance of the said order should not be revoked, set aside and cancelled."

Chandavarkar, J., held that the Court had no jurisdiction to cancel the sale as it had none to sanction it.

The applicants appealed against this order.

Sitalvad with Jinnah and Weldon for the appellants:—The Insolvency Court has jurisdiction to set aside the sale in question. It was a sale sanctioned by the Court and a sale for which the sanction was necessary. The Official Assignee has no power to conduct this sale without the sanction of the Commissioner. Section 31 of the Insolvency Act does not apply to this case. It does not apply to debts, but applies only to corporeal property. The word 'debts' does not occur in the section. A comparison of section 31 with sections 7, 21, 24, 26, 33, 36 and 50 shows the validity of our contention. In these sections the words 'property,' 'effects' and 'debts' are separately mentioned, but in section 31 only the words 'property' and 'effects' are used. Under section 28 the Official Assignee could not have accepted a pie less than the amount of the debt from the debtor without the sanction of the Court. Can it then be maintained that he could throw it out to a stranger for any amount? Here the ultimate equity of redemption belonged to the Company and therefore it was a debt due by the Company to the insolvent mortgagee. Moreover the Commissioner has power to set aside the sale under the latter part of that section.

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It is the practice not to sell debts without the sanction of the Court. In fact the Official Assignee had obtained the sanction in the present case. The original agreement between the Official Assignee and Mr. Ebrahim was not to take effect until the sanction of the Commissioner was taken. That agreement was cancelled by the Commissioner who ordered the property to be sold to the highest bidder of the two intending purchasers, Ebrahim and Premchand. The conveyance declares the sale as having been sanctioned by the Court.

We submit that the Court has general jurisdiction to set aside the sale and rely on *In re Motion*⁽¹⁾ which appears to support our contention.

If the sanction was necessary for this sale, then it was obtained improperly. The sum advanced by the insolvent was two lakhs of rupees, which together with interest amounts to about

(1) (1873) L. R. 9 Ch. App. 192.

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three lakhs, and that debt was sold for Rs. 13,100. It was due to concealment and misrepresentation of facts by Mr. Ebrahim.

The Official Assignee also did not make proper inquiries; if he had, he would have realised full three lakhs of rupees instead of Rs. 13,100.

We do not bring a suit to set aside the sale because it would lead us to an enormous expense, and moreover the suit can only be brought by the Official Assignee, who, as he supports Mr. Ebrahim, will not undertake to bring it.

Raikes, acting Advocate-General, with *Strangman* for the first respondent :—The sanction was not necessary, and the Commissioner has no power to set aside the sale in the summary way asked for. In cases like the present, it is the practice of the Official Assignee to go to the Commissioner to obtain his advice—not his sanction—whether an intended sale is beneficial or not, and he did so in the present case. The right to sell belongs to the Official Assignee and the Commissioner has no power to interfere unless he is asked to do so by Mr. Macleod. Whether Mr. Macleod takes the advice of the Commissioner or not, the sale is his, and therefore the Commissioner was right in holding that he has no power to sanction the sale and consequently no power to set it aside. The Official Assignee is not charged with fraud; all that is alleged against him is that he was deceived by Mr. Ebrahim. He still believes that the sale under the circumstances was proper. It was stated before the Commissioner that the Official Assignee was willing to allow the present appellant to use his name to a regular suit, provided he was given an indemnity for costs; but naturally the Official Assignee is unwilling to bring charges against Mr. Ebrahim which he does not believe.

Lowndes with *Inverarity* for the second respondent Ebrahim Rahimtoolla :—It is admitted by Mr. Setalvad that his case does not come under section 28 of the Act. It is argued that the Official Assignee has no power to sell this debt under section 31; but what is sold in the present case is a mortgage-debt, which is something more than a debt: it is an interest under section 58 of the Transfer of Property Act. The Commissioner cannot

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interfere under that section because the sale is completed. In obtaining the sanction of the Commissioner, Mr. Macleod only obtained the advice of his superior officer for his own protection, so that he may not be charged with conducting this sale in an hole-and-corner manner. It is a sale by the Official Assignee, he is the legal owner, and the conveyance is in his name. The attitude of Mr. Ebrahim was fair; he desired a public auction, but Mr. Macleod said that a sale by public auction would not be beneficial. Even if Mr. Macleod was guilty of neglect of duty, the sale to us cannot be set aside on that ground. Mr. Ebrahim is not charged with fraud; all that is alleged against him is that he concealed certain facts from Mr. Macleod. But Mr. Ebrahim was not bound to disclose the alleged facts. The Official Assignee says that he did not act on any representation made by Mr. Ebrahim, nor did Mr. Ebrahim make the representation alleged by the appellant. When Mr. Macleod told Ebrahim that he would obtain the sanction of the Court, he only put a condition on the contract like any other condition. Rule 31 of the Rules of the Court for the Relief of Insolvent Debtors in Bombay, not cited by my learned friend, has no application to the present case. *In re Motion*⁽¹⁾ has not a word to suggest about the general jurisdiction of the Court. It was entirely decided under section 72 of the Bankruptcy Act of 1869, corresponding to section 102 of the Bankruptcy Act of 1883. These sections give wide powers to the Bankruptcy Court, but there is no such section in the Indian Act. Prior to the Bankruptcy Act of 1869, questions similar to the present arose also in England; and earlier cases like *Ex parte Gould*,⁽²⁾ *Ex parte Holder*,⁽³⁾ *Ex parte Sidebotham*⁽⁴⁾ and *Ex parte Brettell*⁽⁵⁾ seem to support Mr. Setalvad's contention. But the last of these cases went in appeal as *Ex parte Cutts*⁽⁶⁾ before Lord Cottenham, L. C., who held that the Court never had such a general jurisdiction, and ever since that decision the point was not raised till the passing of the Act of 1869. (Counsel also cited *Ellis v.*

(1) (1873) L. R. 9 Ch. App. 192.

(2) (1822) 1 G. & J. 231.

(3) (1834) 1 Mont. & Ay. 518.

(4) (1835) 4 Deac. & Ch. 693.

(5) (1838) 3 Deac. 111.

(6) (1838) 3 Deac. 242.

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Silber⁽¹⁾ and *Ex parte Lyons*⁽²⁾. Even assuming the Court has jurisdiction to set aside this sale, the jurisdiction is discretionary and the Court would not exercise it in this case: *Ex parte Lucas*⁽³⁾; *In re Arnold*.⁽⁴⁾ It would not exercise it also on the ground that, as no appeal lies from the Insolvency Court to the Privy Council, we should be deprived of the benefit of their consideration.

[JENKINS, C. J.:—Is that so? *Kus'oor Chand Rai Bahadur v. Rai Dhanput Singh Bahadur*,⁽⁵⁾ is an instance in which appeal was allowed to the Privy Council from the Insolvency Court. But perhaps the point was not raised.]

Section 73 of the Insolvent Debtors' Act only gives a right of appeal to the Court of Appeal. It is doubtful that at a time when no appeal could lie to the House of Lords from the decisions of the Bankruptcy Court of England, the Legislature meant to give that right in India.

Setalvad in reply:—In *Ex parte Cutts*,⁽⁶⁾ the point was whether the purchaser had by his own act submitted to the jurisdiction and the Court decided he had not. As regards suppression of facts, *Boswell v. Cousins*⁽⁷⁾ is an authority.

[JENKINS, C. J.:—Is that case not overruled by the House of Lords?]

Yes, it is reported in 11 App. Cas. 235. The House of Lords only say that the proposition is too broadly stated. As regards appeal to the Privy Council, *In re Bhagwandas Hurjivan*⁽⁸⁾ may throw some light. If the Official Assignee is unwilling to put allegations against Ebrahim, our plaint will be dismissed for disclosing no cause of action. (Counsel also cited section 55 of the Transfer of Property Act and section 32 of the Insolvent Debtors' Act.)

JENKINS, C. J.:—This appeal arises out of an application by certain creditors in the insolvency of Bhucandas Lalubhai and Hurgovandas Ichharam to set aside a sale of property of the insolvent.

(1) (1872) L. R. 8 Ch. App. 83.

(2) (1872) L. R. 7 Ch. App. 491.

(3) (1833) 1 Mont. & Ay. 93.

(4) (1891) 9 Morr. 1.

(5) (1895) L. R. 22 I. A. 162.

(6) (1838) 3 Deac. 212.

(7) (1884) 27 Ch. D. 424.

(8) (1834) 8 Bom. 511.

The property sold consisted of the insolvents' interest as puisne mortgagees in a mill in Bombay and the debt secured by the mortgage.

On the 10th of April 1905 the Official Assignee agreed with Mr. Ebrahim Rahimtoola to sell the property to him for Rs. 8,000 subject to the sanction of the Court. On the same day Mr. Premchand Roychand made an offer of Rs. 10,500. Mr. Ebrahim at once expressed his willingness to increase his offer to the same amount.

Thereupon the Official Assignee brought the matter before the learned Commissioner in Insolvency, who directed that the property should be put up to sale between the two contending parties, Mr. Ebrahim and Mr. Premchand.

This was done and the property was knocked down to Mr. Ebrahim for Rs. 13,100.

On the 27th June 1905 a deed of assignment was executed by the Official Assignee in Mr. Ebrahim's favour.

On the 6th of September the present application to set aside the sale was made. It was heard by the learned Commissioner, who held he had no jurisdiction and discharged the rule.

From that order the present appeal is preferred.

In my opinion the rule was rightly discharged.

Under the Indian Insolvent Act the Official Assignee has full power to sell the property and effects of an Insolvent, and it is his duty to make sale of the same with all convenient speed (section 31).

True it is that the first agreement for sale to Mr. Ebrahim was expressed to be subject to the sanction of the Commissioner, but this was not because the law so required, but because the Official Assignee desired the Commissioner's guidance.

In the end, however, it was not under this conditional agreement that the property was sold, but in a mode indicated by the Commissioner which required no subsequent sanction by him.

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It cannot, therefore, in my opinion, be contended that the sale was by the Court and as such liable to be set aside on a proceeding like the present.

How then can it be said that Mr. Ebrahim came within the jurisdiction of the Court in Insolvency?

There clearly was no submission on his part, so the jurisdiction must rest, if anywhere, on the words of the Act.

But the only section to which the appellants can point is the 31st; they rely on the concluding words of that section.

But in my opinion that section does not vest the Court with power to set aside a sale completed, as the one in question has been.

But even if those concluding words were capable of the meaning for which the appellants contend, still the Court is not bound to interfere thereunder: it has a discretion.

And when regard is had to the circumstances of the case, and the nature of the contest, I hold that even if there be the jurisdiction, it ought not to be exercised in this case.

If the appellants think they are entitled to relief, then it should be sought in a regular suit. We therefore dismiss the appeal with costs. There will be separate costs for each respondent.

Appeal dismissed.

Attorneys for the appellants:—*Messrs. Daphtary, Fareira and Diwan.*

Attorneys for the respondents:—*Messrs. Payne and Co.*

W. L. W.

PRIVY COUNCIL.

CHANDRASANGJI HIMATSANGJI (DEFENDANT No. 2) v.
MOHANSANGJI HAMIRSANGJI (PLAINTIFF).

P. C.*

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May 3, 4, 8.

June 22.

[On Appeal from the High Court of Judicature at Bombay.]

Evidence—Consideration and weight of evidence—Alleged substitution of one boy for another in infancy—One-sided enquiries made to support allegation—Evidence not judicially taken and without notice to interested parties.

The question in issue was whether the appellant, defendant in the suit, was entitled to the name he bore and to the property in dispute of which he had long been in possession, or whether, as maintained by the respondent, the plaintiff in the suit, the real heir to the property died in infancy, and the appellant when a boy, was fraudulently substituted for him. The first Court found in favour of the appellant, but the High Court reversed that decision mainly on evidence taken on enquiries made under official orders, the effect of which was to place the services of the officials employed at the disposal of the pleader for the respondent in order to enable him to obtain material in support of his case.

Held by the Judicial Committee that even if admissible the evidence so taken was of little, if any, value. It was taken to support a foregone conclusion: the enquiries were secret: no notice was given to anybody on behalf of the boy: nobody was present throughout the enquiries to represent the boy or protect his interests: there was nobody to check the mode in which the alleged statements were elicited, whether by leading questions or otherwise: nobody to test the statements by cross-examination: nobody to watch the accuracy with which they were recorded. Considering the purpose, the nature and the circumstances of the enquiries, which, if they were official in any sense, were certainly not judicial, no weight could be given to the proceedings at, or the results of, those enquiries. The judgment of the High Court was therefore reversed.

APPEAL from a judgment and decree (March 7th, 1899) of the High Court at Bombay which reversed a decree (November 10th, 1897) of the Assistant Judge of Broach and decreed the suit of the respondent.

The suit was brought for a declaration that the present appellant, defendant No. 2, was not the son and heir of one Himatsangji Prathisingji, the late Thákore of Mátar, and that

* *Present*—Lord Macnaghten, Sir Andrew Scoble, Sir Arthur Wilson and Sir Alfred Wills.

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the respondent, the plaintiff, was accordingly entitled to all the moveable and immoveable property of the Mátar Estate; and for the recovery of possession, with mesne profits from the date of suit till delivery of possession, of all the moveable and immoveable property attached to the Mátar Estate and situate in the district of Broach.

The main question involved in this appeal was whether one Chandrasangji, who was admittedly the legitimate son of Himatsangji, the Thákore of Mátar, and Bai Jitba, his wife, born at Jadsal in the Native State of Rajpipla on 31st October 1881, died at Majrol in the Gáikwár of Baroda's territories on 14th May 1883; and whether the present appellant Chandrasangji Himatsangji was really one Jiku, a son of Bai Jitba's brother Parbhat Bapu, and was substituted by Bai Jitba for her dead son, if he did die as alleged.

The principal defendants were (1) Bai Jitba, (2) Chandrasangji Himatsangji, the present appellant, (5) The Collector of Broach as Manager of the Mátar Estate. Defendants 3 and 4 were persons who it was asserted aided in the alleged conspiracy to substitute the appellant for the real heir.

The four defendants who appeared all united in asserting that the defendant No. 2, now appellant, was really Chandrasangji, the son of Himatsangji and Bai Jitba, and the genuine heir to the Mátar Estate.

The Assistant Judge of Broach held that the plaintiff had failed to prove the case he set up and he consequently dismissed the suit.

On appeal the High Court (Candy and Fulton, JJ.) reversed the decree of the first Court and decreed the suit with mesne profits from the date of the decree but without costs.

The facts are sufficiently stated in the judgment of their Lordships. The evidence taken on the enquiries there referred to made by Parbhuram, the Thanedar of Pandu, at Chhaliar, and by the Mámlatdár of Amod in June 1884 was objected to before the High Court as being inadmissible, but that Court admitted it, and relied on it, as the main evidence in support of the plaintiff's case.

As to these enquiries Mr. Justice Candy said—

"Now, the most important evidence in the case is that which relates to the enquiry by the Thanedar, Mr. Parbhuram, at Chhaliar in June 1884. The Assistant Judge admits that this enquiry was made by the Thanedar in his official capacity; and the whole record of the enquiry is, in my opinion, admissible under section 35 of the Evidence Act. The weight to be attached to any particular part of the record may vary, and in some instances may be almost *nil*, e. g., if the Thanedar attached to his record and incorporated in his report the statement of a certain person who, though alive and capable of being called, is not now called as a witness, and therefore has not been cross-examined, though the statement may be admitted as part of the official record as a whole, the probative value of that part of the record may be so little that it can safely be disregarded.

"But that the Thanedar was making an official enquiry regarding a fact which was then and is now in issue, cannot be disputed, and is clearly stated by the Assistant Judge. * * * *

"I pass on to the proceedings of the Mámlatdár Chhaganlal at Mátar on 12th and 13th June 1884. Here, too, it is to be regretted that Mr. Courtenay in his instructions to the Mámlatdár told him to make the enquiries *Mr. Kur-naram may suggest*. But there is no suggestion that Chhaganlal was in any way biassed or acted hostilely to Jitba. In our opinion the copy of his Report of 13th June 1884 (531) is evidence, the absence of the original being accounted for. * * * *

"In comparison with the proceedings of the official enquiries in June 1884 the rest of the evidence is of minor importance. * * *

"The question is whether the Majrol story is proved. It stood the test of the cross-examination of the witnesses in the witness-box (Assistant Judge, section 76), but after this lapse of time much more than that is necessary before the Court can eject the 2nd defendant from the estate. The story must be supported by overwhelming circumstantial evidence. That such exists is shown by the fact that in June 1884 two officials—one the Thanedar of Pandu Mewás at Chhaliar in the Rewa Kántha, the other the Mámlatdár of Amod at Mátar in the Broach District—made personal enquiries and inspected and measured the child, who it is admitted is now the 2nd defendant, and the result is that the child was then not a prattling infant of 2 years and 7 months, but a child at least 4 years old and measuring about 3½ feet. It is not the fault of those who represented the plaintiff in 1884 that further investigations were not then made and that the boy was never produced before any European official till August 1887. The 2nd defendant's present appearance and measurement tally more with his being 21 or 22 than 17th; the medical evidence is also in favour of that view. Jitba's conduct is more consistent with the child, which she put forward as Chandrasang, being spurious than genuine.

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"On the other hand what have we?

"(1) The fact that the accusation of the fraud in May 1883 was not made till May 1884. That fact has already been explained.

"(2) The fact that there was much delay in abortive criminal proceedings. For the delay and abortive result plaintiff's representatives were not responsible. That cases like this are frequently commenced in the criminal Courts is well known, but it does not follow that the cases may not be true.

"(3) The fact that there was great delay in the first civil suit, and that when it was dismissed in March 1888, plaintiff's father Hamirsang did nothing till his death in February 1894. This, no doubt, is a fact deserving serious consideration. For the delay in the course of the first suit plaintiff's predecessor is not shown to have been responsible, but for the delay after March 1888 Hamirsang is directly responsible. The only explanation is that he was willing to let his son's brother-in-law remain on the *gadi* provided adequate compensation was given to him (Hamirsang). That is not an unnatural idea. Hamirsang is said to have been in debt. It required a plentiful supply of funds to pay the Court-fees on the claim valued at nearly 2½ lakhs of rupees. The Court can therefore hardly draw the inference that the claim must be a false one, because Hamirsang took no steps to urge it from March 1888 till about August 1893, when according to a *yadi* from one of the Bais he had begun to agitate again. Then he died in February 1894, and his rights descended to Mohansang, his grandson, the present plaintiff. The position taken up by Mohansang is clearly indicated by his statement dated 30th July 1894 (Exhibit 333, p. 254). He was willing to compromise, 'being closely related to the Thakore Sabeb.' But admittedly the attempts at compromise fell through and this suit was filed in December 1894.

"After the most anxious consideration the only conclusion I can arrive at is that we cannot avoid the fact that the 2nd defendant was *not* from 2½ to 2¾ years old when enquiry was made in 1884, but was some years older. If so, then he cannot be the genuine Chandrasang. It is true that Mr. Gibb said in October 1884 that 'the difference of age is a mere matter of opinion.' So it is, but as the Assistant Judge showed it is a matter of opinion which in 1884 would have been incontrovertible. The District Magistrate naturally hesitated to insist on criminal proceedings going on, when the dispute from the very nature of the cases was in the first instance one for a civil Court, and hence arose the civil proceedings commenced in 1885 and concluded in the Assistant Judge's Court in 1896. The delay is most unfortunate, but it cannot prevent the Court from giving effect to the conclusions arrived at from a consideration of the evidence.

"I would therefore reverse the decree of the Assistant Judge and award possession to plaintiff of the moveable and immoveable property comprising the Matar Estate."

Mr. Justice Fulton observed—

“On the whole though the conclusion is one that I have come to with great hesitation it seems to me to be proved that the 2nd defendant is not the original Chandrasang. I can see no reason for distrusting Parbhuram's report corroborated as it is by Chhaganlal's enquiry and by the Doctors' inspections in 1895, which showed clearly that the boy did look considerably older than might have been expected if he had been born on the 31st October 1881. The persistent efforts to have the boy brought forward for inspection show that the reports were honest reports and they seem to be strongly corroborated by the opinions subsequently formed by the Doctors. Having regard to the smallness of stature of the 2nd defendant, I think that it is possible that the difference of age at the time of Mr. Steward's inspection and at the time of the boy's admission to the Wadhwan school was not so noticeable as to attract special attention. The difference in appearance between a well grown boy of 6 and a small sized boy of 10 might not be so obvious as to appear conclusive. As to the entry of the age at the Matar school it is not likely that any objection would be taken to the Thakranis's statement of age. It seems to me that in 1884 the Thakranis and their advisers—who must have known clearly what they were charged with, *viz.*, the evidence of Laxmiram Pleader (Exhibit 463) and the petition to the Collector of 30th November 1884 (Exhibit 253)—would certainly have taken steps to disprove such a formidable attack if they had been in a position to do so. The excuse that the mother's fears for the boy's safety alone prevented his production cannot be accepted. The pleaders must have been fully aware of the very serious nature of the case, if true, and how easily it could be disproved if false and if they did not insist on the absolute necessity of the immediate production of the boy, the only conclusion seems to be that his production would not have disproved the allegations made in Parbhuram's report.”

On this appeal which was heard *ex-parte*.

J. M. Parikh and *M. J. Doherty* for the appellant contended that there was no reliable evidence to prove the facts asserted by the respondent in his plaint. The evidence chiefly relied on by the High Court in reversing the decision of the first Court was that which had been adduced in the course of the enquiries made at the instance of Kurnaram by Parbhuram and Chhaganlal respectively; this evidence, it was submitted, was not admissible in evidence, and had been wrongly admitted by the High Court. Reference was made to section 35 of the Evidence Act (I of 1872) and to *Leelanund Singh v. Lakhputtee Thakoorain*⁽¹⁾; *Samar*

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(1) (1874) 22 W. R. 231.

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Dasadh v. Juggul Kishore Singh⁽¹⁾; *Satis Chunder Mukhopadhyaya v. Mohendro Lal Pathuk*⁽²⁾; *Ponnammal v. Sundaram Pillai*⁽³⁾; *Muttu Ramalinga Setupati v. Perianayagam Pillai*⁽⁴⁾; and *Iekraj Kuar v. Mahpal Singh*⁽⁵⁾.

1906: June, 22nd.—Their Lordships' judgment was delivered by

Sir ARTHUR WILSON:—This is an appeal from a judgment and decree of the High Court of Bombay, dated the 7th March 1899, which reversed a decree of the Assistant Judge of Broach of the 10th November 1897. The question raised is one of fact, whether the appellant Chandrasang, the principal defendant in the suit, is entitled to the name he bears, and to the estates which prior to the suit he had long enjoyed, as the son and heir of Himatsang, or whether, as maintained by the plaintiff in the suit, now the respondent, the real Chandrasang died in infancy and the appellant was fraudulently substituted in his place. The First Court held the appellant to be the genuine Chandrasang, the High Court thought otherwise.

Himatsang, who died on the 20th January 1882, was the Thakor of Matar, and as such was possessed of estates in the district of Broach and in Baroda territory, which by custom descended to a single male heir in accordance with the rule of primogeniture. He left surviving him four widows, of whom the first three were childless, while the fourth, Jitba, had an infant son, Chandrasang, born on the 31st October 1881, a few months before his father's death. And there is no question that this son was his father's lawful heir. Himatsang also left surviving him collateral agnates in two lines. The elder line was represented by Parbhatsang, who would have been the nearest heir of Himatsang if the infant had been out of the way. He died in July 1883, and his rights, if any, passed to his grandson Chhatrasang, who in turn died in 1885, and with him the elder line of collaterals became extinct, and its rights, if any, passed to the second line. The second collateral line was represented at first

(1) (1895) 23 Cal. 366 (368).

(3) (1900) 23 Mad. 499 (503).

(2) (1890) 17 Cal. 849.

(4) (1874) L. R. 1 I. A. 209.

(5) (1879) L. R. 7 I. A. 63: 5 Cal. 744.

by Hamirsang, and after his death in 1894 by his son Mohansang, the plaintiff in this suit and respondent in the present appeal.

Upon the death of Himatsang the title of his infant son Chandrasang was at first not disputed; the conflict was as to the administration of his estate. But as soon as that controversy was settled, Parbhatsang claimed the estates as his own, on the allegation that Himatsang had really died childless, and that Chandrasang was a child, of other parentage, fraudulently put forward as the child of Jitba and as the heir of her husband.

From that time, that is to say from March 1882 down to June 1884, this story was the only basis of the claims put forward. It is now clear, indeed it is the case of both sides, that that story was untrue. Its only present importance is in its bearing upon the good faith or bad faith, the probability or improbability, and thus upon the truth or falsehood of another case, based upon events said to have happened at a later period. It is therefore unnecessary to examine the earlier proceedings in detail, but three points may be usefully noted. First, the early claim was by the elder collateral branch; the four widows supported the rights of the infant, and the then representative of the junior collateral branch sided with them. Secondly, the Collector of Broach was in possession of the estates as guardian of the property of the infant duly appointed by an order of Court. Thirdly, though in July 1882 criminal proceedings were instituted before the Political Agent Rewa Kántha, they were withdrawn; and no suit was ever brought to enforce the claim on the ground now referred to adversely to the infant. That state of things continued down to May 1884, two years and a quarter after the death of Himatsang.

The second ground of claim to the property, which is the ground now in question, arises out of events alleged to have occurred on, and immediately after, the 14th May 1883, on which day, it has been alleged, on behalf of the successive claimants, that the boy Chandrasang died, and that another boy, by name Jiku, a son of Jitba's brother, and a boy considerably older than Chandrasang, was fraudulently substituted in place of the deceased. This story was not told in place of the former complaint that Chandrasang himself was a spurious child, for that story

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was still maintained for some time by the successive claimants, though it is now abandoned. The story of the alleged death and substitution on the 14th May 1883 was in addition to this story.

In 1884 Parbhatsang, the original head of the senior collateral line, was dead, and his grandson Chhatrasang had succeeded to his place. In the middle of May 1884 he entered into an arrangement with one Kurnaram, a pleader of the District Court of Broach, in pursuance of which the latter at once took active steps to further the interests of his employer.

On the 30th May 1884 Kurnaram made an application for assistance to the Collector of Broach. He asserted the death of Chandrasang, and alleged the intention to substitute another boy in his place. In accordance with that application the Collector took steps which led to certain investigations and enquiries, the result of which has had an important bearing upon the decision of the case by the High Court. But as these matters will have to be considered in some detail at a later stage it is unnecessary to examine them at this point.

On the 8th September 1884 Chhatrasang made a complaint to the First Class Magistrate at Broach against Jitba on a charge of cheating by personation, the charge being based upon the alleged death of Chandrasang and substitution of Jiku. The Magistrate took depositions on oath and considered the matter once and again. His conclusion was that the story was untrue, and that there was no reasonable ground for a criminal prosecution, and accordingly on the 10th June 1885 he finally dismissed the complaint under section 203 of the Criminal Procedure Code. That order was confirmed by the District Magistrate, and the High Court on the 25th November 1885 refused to interfere by way of revision.

While the criminal proceedings just mentioned were pending, on the 16th April 1885, Chhatrasang brought a civil suit against Chandrasang and others, in which he alleged the death of the real Chandrasang and the substitution of Jiku into his place and name, and asked for declarations of the spuriousness of the so-called Chandrasang, and of the validity of his own title as heir.

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Various delays occurred. Chhatrasang died leaving no male issue, and his rights, if any, passed to Hamirsang, the head of the junior collateral line, and the latter was substituted as plaintiff. The Collector of Broach had to be added as a party, and the plaint had to be returned in order that it might be presented in another Court. That suit was never tried on the merits. It came on before the Assistant Judge of Broach on the 26th March 1888 for the disposal of certain issues of law, and was dismissed for want of a proper stamp. The Assistant Judge said: "As the plaintiff still persists in declaring that his suit is one for a mere declaration, and that it is properly stamped with a stamp of Rs. 10, the only course open to me is to dismiss the suit with costs." Against this decision there seems to have been no appeal.

From August 1893 till near the end of 1894 negotiations were in progress for a compromise between the parties interested, but nothing came of them. It may be noted however that during the progress of those negotiations the appellant was married, and the principal ceremony on the occasion was performed by Hamirsang, whose son the respondent is, and through whom he claims.

On the 12th December 1894 the present suit was instituted by the respondent against Jitba, the alleged mother, and the appellant her reputed son, and others, including the Collector of Broach as administrator of the Matar Estates. Its material allegations were that Jitba gave birth to Chandrasang on the 31st October 1881, that Chandrasang died in his infancy in June 1883, in the village of Majrol, in Baroda territory, and that Jitba, with the aid of others, concealed the death of Chandrasang, and in his place kept with her her brother's son, whose real name was Jiku, giving him the false name of Chandrasang. The plaintiff asked for a declaration that the appellant was not the son and heir of Himatsang, and a declaration that the plaintiff, now respondent, was entitled to the properties in Broach, and that the Collector should deliver him possession. The allegations just quoted were denied, and thus was raised the sole issue now of any importance,

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At the trial before the Assistant Judge the story told was, that, on the 14th May 1883, Chandrasang was removed by his mother, accompanied or followed by certain persons named, in a cart from Matar to Majrol in Baroda. (That mother and child left Matar is admitted, but it is said for Chhaliar.) It is asserted that on the road the child became dangerously ill, that he died at Majrol the same evening, that his body was at once sent for burial, and that the now appellant, said to be Jiku, was sent for and arrived on the 16th, and from thenceforth was held out as the genuine Chandrasang. The genuine child was at that time aged $2\frac{1}{2}$; Jiku, it was said, was at the same time some six or seven years old.

The direct evidence in support of the case so stated was that of three witnesses, as to each of whom the Judge at trial recorded that his evidence was unsatisfactory and untrustworthy, and he totally disbelieved them. He also disbelieved the subsidiary story of an alleged attempt made almost at the same time to obtain another child, presumably less unsuitable in age.

The Assistant Judge dismissed the suit with costs. The High Court, upon appeal, reversed that decision and gave a decree in favour of the plaintiff, the now respondent, but without costs, and against that decision the present appeal has been brought.

The story told is in itself one difficult to accept. The attempt to substitute a boy of Jiku's age for a child of $2\frac{1}{2}$ years would be an extraordinarily daring one, the more so, because no attempt appears to have been made to keep the boy in seclusion, or screen him from general observation.

The fact that the Judge, who heard and saw the witnesses, and whose very full judgment shows the great care and attention which he devoted to the case, disbelieved the witnesses, is entitled to the utmost weight.

Again, it is impossible to approach the story now told without a certain suspicion, arising from the attack so long maintained upon the real parentage of the Chandrasang now admitted to be the genuine child of Himatsang. And this suspicion is necessarily increased by the inconsistent and shiftty conduct of the now respondent and his immediate predecessor in title.

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The extraordinary length of time which was allowed to elapse after the 14th May 1883, the date upon which everything turns, and the 12th December 1894, when the present suit was filed, is also a circumstance very adverse to the respondent. During all that interval, with the exception of a part of 1893 and 1894, when negotiations for a compromise were in progress, there was never a time at which proper steps might not, and ought not, to have been taken to secure a full trial of the question in issue; and that question is one which from its nature specially required to be disposed of while the facts were fresh. When a suit was brought in 1885 it was never pressed to a trial, but allowed to terminate for want of proper stamp duty. The whole course of proceedings from 1883 to 1894 seems to their Lordships difficult to reconcile with a reasonable desire, on the part of the claimants, to have the question of fact investigated before the proper tribunal, and with proper promptitude.

In his judgment upon the appeal to the High Court, Candy, J., said: "The question is whether the Majrol story is proved. It stood the test of the cross-examination of the witnesses in the witness-box, but after this lapse of time much more than that is necessary before the Court can eject the second defendant from the estate. The story must be supported by overwhelming circumstantial evidence." That support, the learned Judges thought, was supplied by the result of the enquiries made in June 1884 by two officials, the Thanedar of Pandu in Rewa Kántha, and the Mámlatdár of Amod in Broach. Those enquiries have been briefly referred to in an earlier part of this judgment, but inasmuch as they formed the substantial ground upon which the High Court overruled the judgment of the first Court, they call for further consideration.

On the 30th May 1884, Kurnaram, the pleader acting on behalf of Chhatrasang, applied to the District Magistrate of Broach for assistance, and accordingly the Magistrate wrote a letter to the Political Agent, Rewa Kántha, which he entrusted to Kurnaram. The terms of that letter explain the circumstances. It ran:—

"Mr. Kurnaram Durgaram Vakil, the bearer, has just informed me that the heir of the Mátar Thakore died about nine months ago, and that there is now at

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Chhaliyar, in the Darbar, a boy whom they intend to substitute for the dead boy.

"Mr. Kurnaram acts for the presumptive heir of the Thakore. He says that if enquiries are at once made at Chhaliyar the fraud will be detected, because the deceased Chandrasang was born on Kartik Sud 9th of 1938, that is, about two and half years ago, whilst the young pretender is about eight years old. Also that the latter's parents are living in Nándod.

"For the present I do not wish to make the matter public by searching for details in my office. But I shall be much obliged if you will have the goodness to make enquiries at your earliest convenience, so that it may be fixed what boy is asserted to be heir and what is his age, otherwise a boy of the proper age might be found. Mr. Kurnaram is furnished with full particulars. I request that you will favour me with the result of your enquiries."

This letter was taken by Kurnaram to the Political Agent, who on its receipt gave instruction to the Thanedar of Pandu, Parbhuram by name, to take with him Kurnaram and make the desired enquiries in his presence, and to report.

Parbhuram and Kurnaram went together to Chhaliar. There they are said to have taken a statement from the boy himself, statements from three other persons, a schoolmaster, a chobdar, and a karbhari, and to have, with the assistance of others, formed the opinion that the boy was about seven years old, and to have caused him to be measured, with the result that his height was found to be three feet six inches.

Parbhuram made his report to the Political Agent, enclosing the statements said to have been made in his presence, and a *Punchnama* said to have been signed on behalf of the members of what was called a *Punch*, which was composed in fact of two sowars in attendance on Parbhuram. Kurnaram was dead before the trial. The evidence of Parbhuram was taken on commission. The schoolmaster was a witness at the trial. The chobdar and the karbhari were not called, nor were the two sowars.

The enquiries at Chhaliar went no further, the boy being removed by his mother to Matar. Thereupon the District Magistrate gave another letter to Kurnaram addressed to the Mámlatdár of Amod, in the district of Broach, in which he appears to have instructed the Mámlatdár "to make the enquiries Mr. Kurnaram may suggest as secretly and rapidly as possible and allow the Darbar people no time to commit a fraud in regard to

a boy whom the Vakil asserts the Darbar have attempted to substitute for the real Thakore, who it is alleged died some months ago."

In accordance with that order the Mámlatdár accompanied by Kurnaram proceeded to make enquiries. He is said to have taken a statement from Jitba, the boy's alleged mother, and at Kurnaram's suggestion to have caused a measurement to be taken with a tape measure of the boy's height while he was lying on a cot, and that height was said to be found to be 3 feet 5½ inches.

When the case was before the High Court, and again on the argument of the appeal before their Lordships, objection was taken to the admissibility in evidence of much of the materials relating to the two enquiries just mentioned, and as to some of them at least it would apparently be very difficult to support their admissibility if it were necessary to decide the point. But the whole evidence seems to have been admitted without objection in the first Court, and their Lordships would have regretted if they had been obliged to dispose of the present appeal upon a question of legal admissibility, and the more so as the appeal has been heard *ex-parte*. Their Lordships are not under any such necessity because they think that, assuming the evidence to be admissible, it is of little, if any, value. This appears to them to follow from the purpose, the nature, and the circumstances of the enquiries.

The District Magistrate received information from Kurnaram which he apparently believed, and which, if true, showed that a grave crime was being, or was about to be, committed, which, if successful, would result in a great wrong with respect to properties in his district; and their Lordships do not doubt that that officer acted rightly in taking such steps as seemed to him necessary, in the emergency, for the prevention of the crime. But it must be observed that those enquiries, if they can be called official in any sense, were certainly not judicial. The effect of the orders was to place the services of the officials employed at the disposal of Kurnaram, the pleader of the complainant, in order to enable that gentleman to obtain material in support of a foregone conclusion. The enquiries were secret, no notice was

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given to anybody on behalf of the boy. Nobody was present throughout the enquiries to represent the boy or protect his interests. There was nobody to check the mode in which the alleged statements were elicited, whether by leading questions or otherwise, nobody to test the statements by cross-examination, nobody to watch the accuracy with which they were recorded.

Upon these broad considerations and without examining in detail the various inconsistencies and defects in the records and in the evidence relating to the enquiries, their Lordships are of opinion that practically no weight can properly be given to the proceedings at, or the results of, those enquiries.

As to the alleged statement by the boy himself, assuming it to be correctly reported, there is nothing to show whether the language is in any part his own, or whether it was put in his mouth by the person conducting the examination; and nothing could be easier than to extract by the latter process almost any statement from a frightened child, who suddenly finds himself alone in the custody of strangers, and some of them officials.

The alleged deposition of Jitba, so far as it was relied upon, refers to matters of which she could have no personal knowledge.

The evidence as to the apparent age of the boy, and as to the alleged measurement of his height, appears to their Lordships, on the grounds already stated, to be wholly untrustworthy. And in this they find themselves in agreement with both the Magistrates who dealt with the criminal charge in 1884 and 1885 and with the Judge who tried this case.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be discharged and the suit dismissed with costs in both the Courts in India. The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitor for the appellant—*E. Pagden.*

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Batchelor.

SARABAI, PLAINTIFF, v. RABIABAI, DEFENDANT.*

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December 9.

Mahomedan Law—Hanafi Sunnis—Divorce—Talak-ul-bain by one pronouncement in the absence of the wife—Execution of talaknama in the presence of the Kazi—Communication of the divorce to the wife—Marz-ul-maut—Death of the husband before expiration of the period of iddat.

A, a Mahomedan belonging to the Hanafi Sunni sect, took with him two witnesses and went to the Kazi and there pronounced but once the divorce of his wife (plaintiff) in her absence. He had a *talaknama* written out by the Kazi, which was signed by him and attested by the witnesses. A then took steps to communicate the divorce and make over the *iddat* money to the plaintiff, but she evaded both. A died soon after this. The plaintiff thereupon filed a suit alleging that she was still the wife of A and claimed maintenance and residence.

Held, overruling the contention that the divorce should have been pronounced three times, that the *talak-ul-bidaat* (i.e., irregular divorce) is good in law, though bad in theology.

Held further, in answer to the contention that the divorce was not final as it was never communicated to the plaintiff, that a *bain-talak*, such as the present, reduced to manifest and customary writing, took effect immediately on the mere writing. The divorce being absolute, it is effected as soon as the words are written "even without the wife receiving the writing."

In order to establish *Marz-ul-maut* there must be present at least three conditions :—

(1) Proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khauf* or apprehension, that is, that at the given time death must be more probable than life :

(2) there must be some degree of subjective apprehension of death in the mind of the sick person :

(3) there must be some external indicia, chief among which would be the inability to attend to ordinary avocations.

Where an irrevocable divorce has been pronounced by a Mahomedan husband in health, and the husband dies during the period of the discarded wife's *iddat*, she has no claim to inherit to the husband.

ONE Haji Adam Sidick, a Cutchi Memon of the Hunafi sect, died on the 11th day of February 1904 at Bandora, leaving him

* O. C. J. Suit No. 425 of 1904.

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surviving his widow Rabiabai (defendant 1) and a daughter Bai Aishabai (defendant 2).

Sarabai, the plaintiff, was the second wife of Haji Adam Sidick. It was alleged by the defendants and denied by the plaintiff, that she was validly divorced on the 19th November 1903 by her husband.

On the day in question Haji Adam Sidick took with him some witnesses and went to the Kazi of Bombay, there to pronounce the divorce of his wife Sarabai. She was not present there at the time. It appeared that Haji Adam Sidick pronounced the divorce but once and asked the Kazi to prepare the customary *talaknama* (deed of divorce). The Kazi did so: and it was signed by Haji Adam Sidick and was attested by witnesses.

Steps were then taken to communicate the divorce, and to pay the *iddat* money, to the plaintiff, but she evaded both.

Eventually on the 25th June 1904, Sarabai filed the present suit whereby she prayed that "it may be declared that the plaintiff is entitled to a suitable provision for maintenance and residence being made for her out of the estate of " Haji Adam Sidick.

The defendants contended *inter alia* that the plaintiff was validly divorced by Haji Adam Sidick on the 19th November 1903 by an irrevocable divorce and that she had no claim to the estate of Haji Adam Sidick.

The issues raised at the trial were as follows:

1. Whether the plaintiff was validly divorced by the deceased.
2. If so, whether she is entitled to maintenance ^{and}/_{or} residence ^{and}/_{or} any right under the will.
3. If she is entitled to maintenance ^{and}/_{or} residence, what provision should be made therefor?
4. To what relief, if any, is plaintiff entitled?

Davar, with *Raikes*, for the plaintiff:—It is admitted that the parties being Sunnis and Cutchi Memons are governed by Hanafi Law. In Mahomedan Law there are three forms of divorce: *Talak ahsan*, *Talak hasan* and *Talak-ul-bidaat*. In this case, the

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form of the divorce would be *talak-ul-hidaat*. Our submission is that divorce is not complete because there is no valid pronouncement. Simply the words "*talak dia*" are not enough in themselves to constitute a valid divorce. See Hamilton's Hedaya, pp. 76, 77 and 80; *Furzund Hossein v. Janu Bibee*⁽¹⁾. There must be formal pronouncement. If the word *talak* is used by itself and without the addition of the word *ba'in*, it would only be a reversible divorce, or *talak rajai*.

Moreover, divorce must be addressed by the husband to the wife; a mere statement in her absence is not enough. But supposing it is enough, then we submit that under the formality prescribed by the Mahomedan Law, there must be triple repetition, though the form may be repeated all at the same time. *In re Kasam Pirbhai and his wife Hirbai*⁽²⁾ and *In re Abdul Ali Ismailji*⁽³⁾ show that there must be three pronouncements to effect a valid *talak bidaat*. The same point had arisen in *Ibrahim v. Syed Bibi*⁽⁴⁾. We submit that the doctrine of pronouncement must not be extended further. At first the rule was that these three pronouncements should be made separately during three successive *tahrs*, but subsequently the Mahomedan lawyers extended it in favour of the husband by allowing these three pronouncements to be made at one and the same time. The rule is thus sufficiently extended in favour of the husband, and no English Court should extend it further against the wife.

But if divorce of this sort, *i. e.* with one pronouncement of "*talak dia*," can acquire validity, it can do so only by communication. There was no communication in this case. There is no decided case in which the Court has held that *talak* was good unless there was communication to the wife or to some one on her behalf. Except the visit of the Kazi to the plaintiff's house, there is no evidence of communication.

Supposing divorce is proved, then we submit that the testator having died before the completion of the *iddat* plaintiff is entitled to a widow's share. Even if the period of *iddat* has expired we contend that divorce does not bar her right of inheritance, because it was pronounced during a *marz-ul-maut*: Fatwa

(1) (1878) 4 Cal. 588.

(3) (1883) 7 Bom. 180.

(2) (1871) 8 Bom. H. C. R., 95 (OR, CA.)

(4) (1888) 12 Mad. 63.

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Alamgiri; Hamilton's Hedaya, p. 99—Divorce of the sick; Baillie's Moohummudan Law, p. 277; Wilson's Digest of Anglo-Muhammudan Law, sections 31 and 78. On these authorities, even though there was a valid divorce, she would succeed. As to *marz-ul-maut*, we submit that if a man were sick of one kind of sickness, and he died of another, the first sickness would still be a *marz-ul-maut*, Hamilton's Hedaya, p. 99.

In the document of divorce, the Kazi uses the words "*one bain talak*." If this document is held admissible, then our submission is that such a *talak* must be given during a *tahr*, otherwise it is a revocable *talak*: Baillie's Moohummudan Law, p. 207. This fact must be proved by the person relying on the validity of the divorce. But no evidence was given by the defendants on this point.

As to the codicil, we submit that the testator simply states therein the consequences of Mahomedan Law. It is not the expression of his intention, but his view of Mahomedan Law. The testator could not bar his wife's right to the inheritance, but he could exclude her from his bounty. On the death of the testator she stood in the position of a Hindu widow.

Lowndes and *Jardine* (with them *Scott*, Advocate General) for the defendants:—The first question is as to factum of the divorce. There cannot be any doubt there was a divorce. As to the pronouncement we rely on the statement of the Kazi. One of his important official duties is to pronounce divorces; the Court should, under section 114 of the Evidence Act 1872, presume that the Kazi must have done all that is required by the law.

We rely on the document of divorce which is a written record solemnly prepared. Such a solemn deed is, we submit, sufficient in itself to make a divorce valid. *Khajah Goukur Ali Khan v. Khajah Ahmed Khan*⁽¹⁾ points out that some written record of the divorce would be kept. The use of the word *bain* in the *talaknama* is enough.

But even if this document is put out of the case, then we have the words "*talak dia*" used by the deceased before the Kazi. In this case, we submit, the words sufficiently show the intention of

(1) (1873) 20 W. R. 214 (Civ.).

the deceased. Under Mahomedan law, intention is most essential in cases of divorce, and not the actual forms of the words.

In Mahomedan law, there are two forms of divorce: Hedaya pp. 77-78. If divorce could be pronounced by ambiguous words, then the words "*talak dia*" would be enough, for intention only is the most important.

It is argued by the other side that one *talak* is bad *in toto*, but the authorities cited are mere dicta and not binding on this Court. Moreover, the most laudable form of divorce is *Ahsan*, which has to be pronounced in one sentence; surely, there cannot be three pronouncements in one sentence: Hedaya p. 72 and Fatwa Alamgiri which give forms of each kind of divorce. In this case, the Kazi has used the very form in the document of divorce: see also Hedaya on divorce by comparison, pp. 81-83. If mere *talak* is used, it may be revocable, but if used with vehemence it is irreversible, *e. g.* you are divorced like a mountain, this is *bain*, and three pronouncements are not necessary. Supposing the word *bain* was not used, then we have the writing which by itself would be an effective divorce. But it is argued that it must be communicated. We submit that it was communicated. But if this is held against us, then our submission is that no communication is necessary at all, for, if it were necessary, the effect of a valid divorce would be from the date of communication, whilst in law it is from the date of pronouncement. Hamilton's Hedaya, p. 131; Baillie's Moohummudan Law, p. 355; Bahr on Divorce, Part IV, p. 157; Kazi Khan, p. 552. Otherwise, there would be an extraordinary result: for then the period of *iddat* following upon a divorce would expire, yet the divorce would not be effective.

We admit that if a divorce is pronounced in a *marz-ul-maut*, and the man does not recover, his widow inherits. The onus of proving death-illness is on the plaintiff, and it is not discharged. Fatwa Alamgiri, p. 277, note to the heading death-sickness; Hamilton's Hedaya, p. 99; Baillie's Moohummudan Law, pp. 277, 355; Wilson's Digest of Anglo-Muhammadian Law, p. 178; Bahr on Divorce, p. 46; Kazi Khan, p. 555.

The actual cause of death in this case was paralytic stroke, but supposing the divorce was pronounced during

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death-bed sickness, then we submit that *Muhammad Gulshere Khan v. Mariam Begam* ⁽¹⁾ and *Fatima Bibee v. Ahmad Baksh* ⁽²⁾ would apply. These cases relate to gifts during death-bed sickness, but the same conditions would apply to divorces during death-bed sickness.

As to the argument that the *bain talak* must be during a *tahr*, we submit that proof of *tahr* is a fact peculiarly within the knowledge of the plaintiff, and she has not given any evidence on the point.

As to the construction of the will and codicil, the testator treated the plaintiff in the will as one of his heirs, but in the codicil, he mentions the fact of divorce and his intention, and says in effect "But I have divorced her and therefore I intend her to take nothing."

Raikes in reply.—Section 114 of the Evidence Act does not apply. One cannot prove divorce by simply proving that the man went before the Kazi for that purpose, who must have done all necessary acts. It is the Court which has to see that what was necessary to make a divorce valid, was or was not actually done by the Kazi, otherwise the Kazi would be the judge.

BACHELOR, J:—The plaintiff, who is a Mahomedan lady named Sarabai, was formerly the wife of the deceased Haji Adam Haji Sidick, a Cutchi Memon Mussulman, and now brings this suit against the estate for maintenance and residence as his widow. By an amendment of the plaint she has also put forward an alternative claim based upon the will of the deceased Adam. The defendants are a widow and daughter of Adam and the executors appointed by this will. They resist the claim on the ground that the plaintiff was validly divorced by Adam according to Mahomedan Law. Upon this point the plaintiff's case is that she has no knowledge of any such divorce and that if in fact she was divorced, then the divorce is invalid under Mahomedan Law.

The following are the issues on which the parties went to trial:—

(1) (1881) 3 All. 731.

(2) (1903) 31 Cal. 319.

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1. Whether the plaintiff was validly divorced by the deceased.

2. If so, whether she is entitled to maintenance ^{and}/_{or} residence ^{and}/_{or} any right under the will.

3. If she is entitled to maintenance ^{and}/_{or} residence, what provision should be made therefor?

4. To what relief if any is plaintiff entitled?

It is common ground that the parties are Hanafi Sunnis and are therefore governed by the law applicable to that division of Mahomedans.

The following appears to me to be the most orderly way of considering the various questions which arise:—

1. Did the deceased validly divorce the plaintiff?

2. If he did, was the divorce pronounced when the deceased was in his death illness (*marz-ul-maut*) or not?

3. If it was pronounced when deceased was not in his death illness what is the effect of the divorce on the present claims?

As to the first question the principal evidence is that of the Kazi Mahmad Ali Murghay and of the *talaknama*. It is proved that Adam taking with him two attesting witnesses went to Mahmed Ali Murghay who is the Kazi of Bombay and there pronounced the divorce of the plaintiff and had a *talaknama* written out by the Kazi which *talaknama* Adam and his witnesses signed. Assuming, as for the purposes of this issue I must assume, that all else was regular, I apprehend that a Court ought not to be astute to set aside that which Adam sought to effect in open conformity with the Mahomedan Law and with the usual formalities; and these considerations are especially weighty under a legal system which permits great facility of divorce. "Every divorce is lawful," the prophet has said, "excepting that of a boy or lunatic."

Now the first objection taken is that Adam's pronouncement, "*talak diya*," was not made actually to his wife, but in her absence to the Kazi and the two witnesses. As authority for the objection reference is made to *Furzund Hossein v. Janu*

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Bibee ⁽¹⁾, but that case does not formally decide the actual point now before me, and if it did so then with great respect I should not be able to follow it. For, as I read the books, the Moslem lawyers nowhere require that the pronouncement should be made directly to the wife. No such requirement can be discovered, and there are many passages which negative any such theory. For instance, if a person says to a man "Have you not repudiated your wife?" and he says "True," she is repudiated: Baillie, page 214. And there is a separate section of the law dealing solely with repudiation by writing, where we read that where the writing is customary and manifest—as it was here—the repudiation takes immediate effect: see Baillie, page 233. And the same point is brought out more clearly in para. 2058 at page 95 of Vol. III of Mahomed Yusoof Khan Bahadur's work on Sunni Mahomedan Law. I read this paragraph which leaves no doubt that in such a case as this, where the divorce is unconditional, it takes effect at once, and the wife is bound to observe the *iddat* from the time of the writing. See too para. 1802 at page 5 of the same volume, where we read: "A man says in respect to his wife 'divorced' (meaning 'she is divorced'), without naming the woman, and he has one well known wife; his wife shall become divorced by way of analogy (*Istihsan*)."

Then it is said that since this was a final divorce the pronouncement should have been made three times, whereas the Kazi speaks of only one single pronouncement. Upon this point *Ibrahim v. Syed Bibi* ⁽²⁾ and *In re Abdul Ali Ishmarji* ⁽³⁾ are cited, but neither case is a clear authority upon the point in issue. There can be no doubt that a *talak-ul-bidaat* (or irregular divorce) is good in law, though bad in theology: and *Ibrahim's case* decides nothing more than that no special expressions are necessary to constitute a valid divorce.

It must be admitted that the three separate pronouncements alleged to be necessary may be made one after the other in as many seconds, and, the law having advanced thus far, it is difficult to see why everything should be held to depend upon

(1) (1878) 4 Cal. 588.

(2) (1886) 12 Mad. 63.

(3) (1883) 7 Bom 180.

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the mere punctilio of repetition. *Cessante ratione cessat et lex*, and it is tolerably clear that the only reason for the separate repetitions was exclusively applicable to the more approved forms of divorce, when there was a repetition in each of three succeeding *tahrs* (periods between menstruation), thus affording the husband an opportunity of reconsidering his decision. Admittedly this precaution has disappeared out of the law, and, unless I am forced to do so, I shall be very reluctant to let important questions of right depend upon whether a formula was said once or repeated three times. And I find that the authorities are not against me upon this point. I read the passage at page 204 of Vol. I of Hamilton's *Hedaya*, which appears plainly to support the view here taken. It is also relevant to know that we are dealing with a system where divorce under compulsion or in a state of inebriety is valid and where divorce though only once pronounced may be effected by many kinds of far fetched implication, of which the books abound in illustrations. So where the divorce is prescribed in words implying vehemence or amplification (*e.g.*, "an enormous divorce", "a divorce like a mountain") an irreversible divorce is effected (Hamilton, Vol. I, pp. 228 *et seq.*): and here I find as a fact that Adam pronounced the *talak-ul-bain* vehemently. This appears from the proof (Exhibit No. 6) of which the Kazi admits the general correctness, and is most consistent with the acts and intentions and conduct of the parties. So far as I can gather from the authorities, the triple repetition is merely one of the many forms by which a *talak-ul-bain* or irrevocable divorce can be effected, as the same result can be attained by any other words apt for the purpose and so understood. That the Mahomedan Law attaches no magic to the mere repetition of a formula is evident from the circumstance that even in the *ahsan* or most laudable form of divorce a single pronouncement is sufficient. On the facts of this case, looking to all circumstances, words and writing and intention and conduct, I cannot doubt that there was a valid *bain* divorce in the *bidaat* form.

Then there is a third objection, namely that this divorce cannot be considered final because it was never communicated to plaintiff. The evidence is quite clear that every practicable step

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was taken to communicate the divorce and make over the *iddat* money to the plaintiff, and that these measures, if they were frustrated, were frustrated solely by her own obstinate refusal to accept the paper or the moneys. In these circumstances it would be a strange result if plaintiff were allowed to take advantage of her own inaccessibility. But I find nothing in Mahomedan Law to countenance such a conclusion. On the contrary, the authorities show that a *bain talak*, such as this, reduced to manifest and customary writing, takes effect immediately on the mere writing: see, *e. g.*, Baillie, page 233: Moulvi Mahomed Yusoof, Vol. III, page, 95. The divorce being absolute, it is effected as soon as the words are written "even without the wife receiving the writing."

Mr. Raikes indeed has contended that it is not competent to the defendants now to rely on the *talaknama* because this writing was not put forward as the basis of their case in the written statement. But I think that the oral pronouncement and the *talaknama* are all part of one single transaction, whose effect has to be ascertained, and I cannot conceive that reliance upon the *talaknama* is in any sense a new case. To my mind this *talaknama* is decisive: it describes the divorce as *talak-ul-bain* and emphatically declares that all rights and liabilities between Adam and plaintiff as husband and wife have ceased and determined. There is ample authority in the books for the view that such a writing, even though not communicated to the wife, effects an irrevocable (that is merely the English rendering of *bain*) divorce as from the date of the document.

It was suggested that there is no evidence that this divorce was pronounced during the plaintiff's *tahr*. But nothing was heard of this point until Mr. Raikes's closing address, and seeing that the matter is one specially within plaintiff's knowledge, and that plaintiff has not come into the witness box, I must disallow this objection. It will be remembered also that the divorce was pronounced over two years ago.

Finally with regard to all these three objections I consider it important to notice that we are not in mediæval Arabia, but in modern India. Let us look at the case a little broadly. We have a Moslem husband who is by law entitled, if he

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chooses, to divorce his wife irrevocably, and who is resolved to do so. How does he set about it? Not by any hole and corner device, but by adopting the most open and elaborate procedure possible to him. Taking his two witnesses, he resorts to the head Kazi—a gentleman of position, a Justice of the Peace and Honorary Magistrate—and there goes through all the formalities which are, in the understanding of the members and the heads of Islam *hic-et-nunc*, requisite and sufficient to give validity to his act. Without constituting the Kazi the judge of this suit, I am decidedly of opinion that solemn acts of this kind ought not lightly to be set aside, but rather invite the favourable application of the maxim that *omnia presumuntur rite esse acta*. And this position seems to me all the stronger under Mahomedan Law, which treats with special respect all orders authenticated by the Kazi. This particular Kazi and his fathers have made hundreds of divorces, and the divorce in question was made with all formalities understood here to be required in order to render it irrevocable. To induce me now to set it aside, I should require more weighty reasons than the formal and technical objections which I have considered. The Mahomedan law looks to the intention, when accompanied by a reasonably plain expression of it; and I conceive that under neither of these heads is any serious dispute possible upon the evidence before me.

The fact of a valid divorce being thus established, it becomes material to consider whether it was pronounced during Adam's death-illness or not. For the sake of brevity I shall use the word 'sickness' as referring only to death sickness and the word 'health' will serve to denote the absence of death-sickness, this usage being also in conformity with the language of the books. First, then, what is meant in Mahomedan law by this sickness or *marz-ul-maut*? Baillie, in discussing the subject under the head of divorce, says:—"It is correct to say that, when a man is unable to go out of his home for his necessary avocations, he is sick, whether he can stand up in the house or not." This is developed in later passages, but since they depend upon an underlying legal principle, I must pause to explain what that principle is, so far as I can collect it from the approved

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authorities. For in such a matter as this it appears to me that my only course is to abide by the accepted authorities, adhering to whatever clear principles may be discernible. In this particular instance both the principle and the reason upon which it is grounded seem to be unmistakeable. They will be found generally in discussions upon the opinions of Shafei, the Imam-ul-Motlebi, of whom Hamilton writes that "His decisions in civil and criminal jurisprudence are seldom quoted by the doctors of Persia or India but with a view to be refuted or rejected." (Hamilton, Vol. I, p. xxviii (Discourse). The references are all throughout to the four Volume edition of 1791.) Shafai, who maintain what may be called the common law position in these matters, held that whether a man's death took place before or after the expiration of the *iddat*, his divorced wife was left without any right of inheritance, because the conjugal relation was cancelled by the supervening divorce. But this view was rejected on what approximates to the equitable principle that the cause of the wife's right to inherit is in the death illness, and as the husband designs to defeat it, his device ought to return to himself by postponing the effect of his act till the expiration of the *iddat*, to prevent the injury which would otherwise fall upon her. (Baillie, page 278). So repudiation by a man in his last illness is always referred to as repudiation by a *faar* or evader, and the principle appears to be the perfectly intelligible doctrine that a wife's slowly accrued rights shall not be suddenly defeated by the caprice of the husband while labouring under such mental infirmity as usually accompanies the approach of death. These observations must be applied when I come to deal with the question of the effect of this divorce upon the plaintiff's rights. But I am obliged to notice them here since they are germane also to the question of the meaning of death-illness. Thus we read in Hamilton's Hedaya, Vol. I, page 283 :—"If a husband, being in a besieged town or in an army, repudiate his wife by three divorces, she does not inherit of him, in the event of his death, although that should happen within her *Edit*: but if a man engaged in fight, or a criminal carrying (? being carried) to execution, were in such situation to pronounce three divorces upon his wife, she inherits where he

dies in that way, or is slain : for it is a rule that the wife of a *faar* (or evader) inherits of him, upon a favourable construction of the law : and his evasion cannot be established but where her right is inseparably connected with his property, which is not the case, unless he be [at the time of pronouncing divorce] sick of a *dangerous* illness (appearing from his being *confined to his bed*, and other symptoms) or in such other situation as affords room to apprehend his death : but it is not established where he pronounces divorce in a situation in which his *safety* is more probable than his *destruction*." Baillie (pages. 280-81) has very much the same description. "Evasion," he says, "may also be established by other causes which come within the meaning of disease, if death be imminent ; but if the chances are in favour of escape, the person is to be accounted as one in health. So that one is not an evader though he were surrounded by the enemy, or in the line of battle, or in a place abounding with beasts of prey, or on board ship, or in prison under sentence of retaliation or stoning ; because in all these cases a way of escape may be found by some means or other." I pause here to remark, first, that these are strong cases and, secondly, that if the principle is to be applied loyally, it must count for something whether the divorcer himself is conscious of the likelihood of death or is not so conscious. The same subject occurs again in Baillie's Chapter on Gifts, where I see no reason to suppose that the death-illness discussed differs from the death-illness in case of repudiation. And here we read that "the most valid definition of death-illness is, that it is one which it is highly probable will issue fatally, whether, in the case of a man, it disables him from getting up for necessary avocations, out of his house or not, such as, for instance,.....when he is a merchant, from going to his shop." This appears to be the definition in the *Fatawa-i-Alamgiri*, and I may say briefly that other relevant authorities appear to follow the same lines. It would follow that what is meant by death-illness in Mahomedan law is an illness which does in fact cause death, which disables the sufferer at the given time from pursuing his ordinary avocations, and which raises in his mind some apprehension of the probability of death. So where the illness is of long dura-

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tion, but there is no immediate probability or apprehension of death, it is laid down that that is not a death-illness but is to be regarded rather as an indication merely of altered constitution or physical habit. Indeed upon examining the books I seem to find that the only certain test of death-illness laid down is that a man shall not be able to stand praying—no doubt rather a rough test adopted in days when medical diagnosis was itself rough, but indicating pretty clearly the rigorous meaning which Mahomedan jurists attached to the phrase *marz-ul-maut*.

The Hedaya contains what is called a rule for ascertaining a death-illness, and this will be found in Book LII, Chapter II of Hamilton, Volume IV, page 506. Whatever may be the case in the original Arabic, it must be confessed that in the translation the passage is encumbered with much confusion, the particular being confounded with the general, and the sentence being further darkened by parentheses. But, so far as any plain meaning is to be wrung from the words, it would seem that the test is "immediate danger of death" or "apprehension of death"; and this conforms to the principle which has already been deduced. The same test is to be gathered from the treatise of Maulvi Mahomed Yusoof, the passage being at pages 392-3 of the third volume, paragraphs 2920 to 2924. Here again it is laid down by the Fatawa-i-Kazikhan that he only is to be deemed sick who is bed-ridden and incapable of managing his affairs "because the probability from his condition is dissolution," so that if he divorces his wife, he is a *faar*, i. e., a runner away, an evader. "But", we read, "a person who is decrepit or suffering from paralysis, whose complaint does not go on increasing every day, is like one in health. So also one who is wounded or is suffering from pain, but who is not by such wound or pain rendered bed-ridden, is like one in health." And then we find the instances of the man arrayed in rank against an enemy in battle or imprisoned under sentence of death, to which I have already referred.

I admit that this question is not to be decided merely upon medical principles as now ascertained among Western peoples; but my examination of the authorities leads me to the conclusion

that in order to establish *marz-ul-maut* there must be present at least these conditions:—

- (a) proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khauf* or apprehension, that is, that at the given time death must be more probable than life :
- (b) there must be some degree of subjective apprehension of death in the mind of the sick person :
- (c) there must be some external indicia, chief among which I would place the inability to attend to ordinary avocations.

These, then, are the incidents of death-illness which as it seems to me are to be gathered from the authorities; and that they have commended themselves also to our British Court may, I think, be seen on reference to *Fatima Bibee v. Ahmad Biksah*⁽¹⁾ and the cases there cited.

Adopting these principles I pass to consider the evidence of fact in this case. That evidence, as was perhaps to be expected, is conflicting, but I cannot say that I have felt any serious difficulty in reaching a conclusion. In the first place one must bear in mind that Adam was an old man—he was 63—and there is no doubt that he looked his age. Then, again, one must not overlook the obvious: Adam was an elderly Asiatic of the trading community, with whom physical activity is the exception and physical indolence the rule. If an instance be desired, I need not travel outside the case but may point to witness Rahimtoola Meheralli, a strong young man of 24 who conceives himself unable to walk a couple of miles after a day's office work. Then it must be remembered that Adam had no living son and was anxious to have a son; that he had the habit or mania (as one witness describes it) of physicking himself; and that upon the evidence there can be no reasonable doubt but that his medicines were, in general, aphrodisiacs. This, I say, is proved by the evidence, and it is all of a piece with the other circumstances which have been forced on my attention. This, then, is the kind of man who is the subject of this inquiry, and

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of whose death the immediate cause was unquestionably paralysis.

Passing to the witnesses, we have first the hakims Akbarsha and Gulam Mohidin. I have not had the advantage of seeing these persons, as they were examined on commission, but a study of their depositions does not impress me favourably. Even if they were perfectly truthful, their elementary ignorance of medicine and the confused vagueness of their descriptions would render their statements of no real assistance to me. Though they endeavour to conceal it, I cannot doubt that the drugs which they prescribed were simply aphrodisiacs. But the stress and meaning of their evidence is that Adam was suffering from heart disease, and in my opinion there is overwhelming evidence that that is not so. Upon this point it should suffice to refer to the two experienced doctors who attended Adam during his last illness after he had been attacked by paralysis on the 29th January. Dr. Childe is a Major in the Medical service, M. B., London, and Senior Physician of the Jamsetji Hospital. Dr. Rao holds the distinguished degree of Doctor of Medicine, London. Both these gentlemen examined Adam on several occasions in his last illness, and both depose that there was no indication of any malady of the heart, nor was anything of the sort suggested to them. It was a plain case of hemiplegia following the bursting of a blood vessel on the brain due to the weakening of the vessels consequent upon old age. Of the other symptoms which, as explained by Major Childe, accompany heart disease, we hear nothing from the plaintiff's witnesses; and though Mr. Raikes has ingeniously sought to make a point of the fact that Adam wore socks, I cannot bring myself to think that there is any substance in the point. The witnesses say that old men always do feel anything approaching cold, and this statement has not been challenged. But that every elderly native who wears socks does so because he suffers from cold in the extremities due to heart disease, is a chain of reasoning in which I see many weak links and none strong. There are many other indicia which conflict with the hakim's story of heart disease, but these will be noticed as I deal with other witnesses. Here I may advert to another matter which seems to me to be closely

related to the incident of the wearing of socks. There is evidence that Adam was not fond of walking up flights of stairs—I do not think it amounts to more than that. One may well ask, what then? Native gentlemen advanced in years do commonly avoid climbing stairs if it can be avoided, and the circumstance seems to me really to throw no light at all on any question of heart disease. There is abundant other evidence that, when need arose, Adam was quite able to go up and downstairs. Cumulative evidence is one thing; it is quite another thing to attempt to make out a positive case by means of disconnected fragments of evidence, each one of which is of no real significance: zero multiplied is still zero.

The remaining witnesses examined for the plaintiff are Saboo Sidick, Haroon Tyab and Mahomed Bachoo, to whom may be added the Kazi on this point. As to Saboo Sidick, I have no wish to say more than this, that he does not assist the plaintiff. He is an interested party, admitting that he was enraged by Adam's making the codicil to his will. He makes no allusion to heart disease in examination-in-chief, and though he supplies the deficiency when the point is prominently brought to his notice in cross-examination, he explains his previous silence by saying that Adam only some times complained about his heart. He admits that Adam went frequently, it may be daily, to his solicitor's office, and as to his complaints of pain in the head and stomach I am of opinion that this testimony, when fairly assessed, must count for very little. The witness is certainly biassed in plaintiff's favour, and I prefer the evidence that Adam absented himself from the marriage of witness's son, Mahomed Bachoo; and if that is so, witness and Adam were certainly on unfriendly terms. Allowing, then, for some exaggeration, I find no special significance in the fact that an old man, who was dosing himself with aphrodisiacs occasionally suffered from headache or stomachache: but this in my judgment, has nothing to do with *marz-ul-maut*. The unsatisfactory character of this witness's evidence is further indicated by his story that Adam was visited at the Kambeker street house before the stroke of paralysis by two European doctors: the description can only apply to Drs. Childe and Rao and they saw Adam only at

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Bandra after the stroke of paralysis. Haji Haroon Tyeb also makes no mention in examination-in-chief of any complaint by Adam of heart disease. It is very possible that Adam occasionally complained of trifling indisposition, which is likely to be magnified in the retrospect which takes account of the subsequent paralysis and death; but the witness admits that Adam went frequently to the Fort on his usual business. As to the allegation that he took to having his meals on his ground-floor office instead of going upstairs for them, it must be remembered that no single witness is in a position to affirm that Adam *always* did so; and that Adam was both a busy man and an old man, so that the fact observed may be attributed either to press of business or to the indolence of old age, and does not necessarily suggest any specific malady. There is ample evidence that Adam, at least frequently, went upstairs for his lunch, and that evidence I can discover no reason to distrust. The next witness, Abdulla Haji Abu Bucker, admits that Adam sometimes came downstairs for his meals, and in other respects this witness's testimony is almost colourless. The lad Mahomed Bachoo carries the case no further. Then comes the Kazi Sahib, whose evidence at first sight does seem to supply the plaintiff with some groundwork for her case. But even if that evidence stood subject to no deduction, I do not think it would suffice for plaintiff's purposes. Adam's reluctance to go upstairs to the Kazi may have been due to such neutral causes as I have already noticed, or it may have arisen for some affectation of dignity. Of this we find an indication in the circumstance that before this date Adam had tried to get the Kazi to go to him instead of himself going to the Kazi. For the rest, what does the Kazi say? After hesitating whether to describe Adam as well or ill, he says only this that "he seemed to be rather unwell, but was walking all right. I did not speak to him about his state of health. He said I must write the deed quickly, as he was uneasy and must go home soon". This was on the 19th November, and for Adam's liability to passing indisposition I have already ascribed sufficient causes without calling in aid any theory of established illness. Even if we suppose, then, that every word of this description is

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true, there is nothing to connect it with any further indisposition, and the stroke of paralysis of the 29th January, which is otherwise accounted for, is none the less a sudden attack due only to old age and disconnected from any preceding ailment. It is plain from the Kazi's own statement that he never supposed that Adam was in mortal sickness, for in that case he would have made a note of the fact. Then we have it that, a few days earlier the witness signed and approved the proof, Exhibit No. 6, after reading it over carefully and satisfying himself that it was correct. But in this document Adam is described as being in a "sound state of health." I have no desire to disparage the Kazi's explanation of his inconsistency, but the result is that the force of his testimony is perceptibly weakened, for one cannot place implicit confidence in the accuracy of his memory or his observation in respect of details occurring over two years ago.

On the side of the defendants we have an array of witnesses, who depose that up to the first stroke of paralysis Adam was in his normal good health; who are in a position to know the facts; and many of whom inspire me with confidence. If it be remembered what is the upshot of their testimony, it will not be necessary for me to analyse their depositions in detail. The first witness is Karmali Pirbhai. Unfortunately, for the purposes of this case, he is the managing clerk of the defendants' attorneys; but when I have said that, I have said all that can be suggested against him, and though I do not ground my finding on his evidence, I conceive it to be my duty to place on record my opinion that he is a truthful witness. Among other details he mentions that Adam frequently took his lunch upstairs; that he visited the witness at his rooms on the fourth floor of a house about a week before the attack of paralysis; and that he came "pretty well daily" to the attorneys' office mounting two flights of steps to interview the witness. As to the autumn visit to Lanavli, this and other witnesses establish that that was in the ordinary course, and I may take judicial notice of the custom of Bombay people to leave the city between September and November if they can do so. It is shown that Adam went, as usual, to Lanavli to his own house with his family. Abdool

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Sakoor Esmail is the husband of the defendant Ayeshabai, and, that being so, I will not wholly rely upon his evidence, though I will not neglect it, because I am aware of no valid reason why I should disbelieve it. I regard it as affording corroboration of the defendants' case. Then come witnesses Haji Jan Mahomed, Mirza Mahomed Shirazi, Haji Sidick Ismail and Aboo Bucker. These men are strangers to the suit, and no reason is assignable why they should give false or exaggerated evidence. I noted their demeanour while under examination and cross-examination, and the result is that I cannot refuse them credence. They saw Adam constantly up to the date of the stroke (29th January), and they agree that he was throughout in his usual good health, not complaining of any illness, but going about his business in his customary way. Further support is given by Rahimtulla Meherally.

Now this is a large body of evidence, and evidence of a very impressive kind. It is difficult to prove that an old man was in consistently good health over such a period as three months, but upon this evidence I am satisfied that up to the stroke of paralysis on the 29th January, Adam was in normally good health and went about his business as he always had gone about it. I find that the stroke of paralysis was, speaking subject to the limitations of human knowledge in these matters, a sudden, isolated attack, independent of any preceding malady or indisposition. I have shown what in my opinion the plaintiff must prove to establish *marz-ul-marat*, and this examination of the evidence as to facts results in my finding that there is no such proof as the law requires.

The result of the inquiry so far has been to establish that this divorce was pronounced by Ifaji Adam when in health. And the divorce was the *bain talak* or irrevocable divorce. Now the question is whether, an irrevocable divorce having been pronounced in health, and the husband dying during the period of the discarded wife's *iddat*, she has any claim to inherit. There can, I think, be no doubt—and I understand that Mr. Lowndes does not dispute—that if the divorce had been pronounced in death-illness, the wife's claim to inherit would survive throughout the period of her *iddat*. But this survival is based upon the

theory already noticed that a death-bed divorce is to be regarded as an evasion. Clearly that principle fails where the divorcing husband is in health and is under no greater expectation of death than is normally incident to humanity. In that case, then, what reason is there why the wife's claim should subsist throughout her *iddat* even though she has been irrevocably divorced? I can see none on the principle of the thing. Indeed the principle appears to point the other way. For take the case where a man in perfectly good health to-day irrevocably divorces his wife, and is killed in a Railway accident a month hence. Why should she inherit? There has been no attempt at evasion; the repudiation has been complete and definitive; and I can discern no reason why the husband's estate should be damnified owing to an unforeseen accident. So far as the principle is a guide, it seems clear that such a wife would have no claim; and the plaintiff stands legally in precisely the same case.

Then, is there anything in the authorities to assist the plaintiff? In the first place, the passages which I have already cited from Hamilton's Hedaya and Baillie's Digest are decidedly against her, and I would point particularly to the decision in the case of the husband "being in a besieged town or in an army." There the wife does not inherit even though the husband dies within her *iddat*, and the reason is—because there has been no evasion. The law is also so stated at page 391 of Vol. III of the treatise by Maulvi Mahomed Yusoof Khan Bahadur (Tagore Law Lectures, 1891-92). I can discover no authority in a contrary sense, and I therefore find that both principle and authority compel the conclusion that the plaintiff does not inherit to Adam.

That being so, the suit fails. Plaintiff was entitled to her *iddat* money, and that is at her disposal whenever she demands it. Her *iddat* has expired, and she has no claim to maintenance or lodging (Hamilton, Vol. I, 404). It is clear also that she has no claim under the will, for she is disinherited by the codicil. If the words in the codicil are to be read merely as Adam's opinion of the legal effect of the divorce, then upon my finding the plaintiff is out of Court. But in fact these words must I think be read as expressive also of Adam's wish that the plaintiff should take

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nothing under his will, and—the parties being Cutchi Memons—the disinheriting clause is valid.

No other point is mentioned, and the result is that the suit must be dismissed with costs. The defendant's costs, if not recovered from the plaintiff, may be recovered from the estate.

Suit dismissed.

Attorneys for the plaintiff:—*Messrs. Captain & Vaidya.*

Attorneys for the defendants:—*Messrs. Thakurdas & Co.*

R. R.

CRIMINAL REFERENCE.

Before Mr. Justice Russell and Mr. Justice Batly.

THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY
v. MATHURABAI.*

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The City of Bombay Municipal Act (Bom. Act III of 1888), section 3, clauses (w), (x) and (y),† section 461—Building Bye-laws Nos. 40, 42‡—Street—Construction.

The owner of a large plot of ground abutting on a highway divided the plot into 19 small plots and sold them to different purchasers. These plots were

* Criminal Reference No. 7 of 1906.

† The City of Bombay Municipal Act (Bombay Act III of 1888), section 3, clauses (w), (x) and (y) run as follows:—

(w) "Street" includes any highway and any causeway, bridge, viaduct, arch, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years; and, when there is a footway as well as a carriageway in any street, the said term includes both;

(x) "public street" means any street heretofore levelled, paved, metalled, channelled, sewered or repaired by the Corporation and any street which becomes a public street under any of the provisions of this Act.

(y) "private street" means a street which is not a public street.

‡ Building Bye-laws Nos. 40 and 42 are as follows:—

40. In every case—

Where a person who shall erect a building, shall at any reasonable time during the progress or after the completion of the erection of such building, receive from the Engineer notice in writing specifying any matters in respect of which the erection of such building may be in contravention of any bye-law relating to new

mapped out as abutting on the sides of two parallel roads which were marked out as proposed roads. Each of the purchasers of the plots entered into a covenant with the owner to keep open that portion of the proposed road which stood in front of his plot and to prepare so much of the road. The question arose whether the proposed road was a street within the meaning of the City of Bombay Municipal Act (Bombay Act III of 1888) :—

Held, that the proposed road would constitute a street within the meaning of the City of Bombay Municipal Act (Bombay Act III of 1888).

THIS was a reference made by Chunilal H. Setalwad, Acting Fourth Presidency Magistrate of Bombay, under section 432 of the Criminal Procedure Code (Act V of 1898).

The reference was in these terms :

“One Tribhovandas Mangaldas was the owner of a large plot of land opening or abutting on its south side on the Girgaon Back Road. About two years ago he divided this large plot of land into 19 small plots in three rows and sold them to different purchasers. He expressly covenanted with each of the purchasers that in front of each plot an open space should be left unbuilt upon or unlocked in any way in order to enable the owners of the other plots and their tenants to have access to their property. Exhibit 1 is the conveyance and exactly similar conveyances are made with the purchasers of other plots. A reference to the plan attached with Exhibit No. 1 will show that a road of 16 feet width (marked proposed road on the plan) was left between two

buildings and requiring such person, within a reasonable time which shall be specified in such notice, to cause anything done contrary to any such bye-law to be amended, or to do anything which by such bye-law may be required to be done, but which has been omitted to be done.

Such person shall, within the time specified in such notice, comply with the several requirements thereof, so far as such requirements relate to matters in respect of which the erection of such building may be in contravention of any such bye-law.

Such person, within a reasonable time after the completion of any work which may have been executed in accordance with such requirement, shall deliver or send or cause to be delivered or sent to the Engineer, at his office, notice in writing of the completion of such work.

42. Every person who shall commit any breach of any of the foregoing bye-laws shall be punishable with fine which may extend to twenty rupees, and in the case of a continuing breach, with fine which may extend to ten rupees for every day after conviction for the first breach or after receipt of written notice from the Commissioner to discontinue the breach, during which the breach continues.

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rows of plots. The defendant's plot is No. 15 on this plan and the place in front of it is marked red. Most of these plots, including the defendant's plot, have been built upon. Thus there is a road of 16 feet width having rows of buildings on either side and which are occupied by the owners of these buildings and their tenants who make use of this road. There is a road nearly parallel to this road of the same nature and similarly made and there are cross roads between these two. The length of the road in question is about 260 feet. At the south end it joins the Girgaon Back Road. At the north end of it there is a wall and there is no passage on that side. It is an admitted fact that on the original large plot the public had no right of access and now these new roads that are made are meant only for the use of the owners of the building on either side of them and their tenants; the public at large have no right of access to them.

"The said Mathurabai on being desirous of building a house on her plot submitted plans and specifications to the Municipal Commissioner on the 6th April 1905 as required by section 337 of the Bombay Municipal Act. The Municipal Commissioner while disposing of the plans and specification took among others the following objection, 'the building will be more than one and a half times the width of the street it abuts on.'

"Notwithstanding this intimation of disapproval the defendant continued the erection of her building and erected the same to a height of 32 feet, 9 inches. So a requisition under Bye-law 40, dated 16th October 1905, was served upon the defendant calling upon her to amend the work done by her. This requisition being ignored the present prosecution was commenced.

"The point of law that arises under the above circumstances is:—

"Whether the road like the 16 feet wide road marked 'proposed road' on the plan attached to Exhibit No. 1 and also on the block plan on which the defendant's building abuts, which has buildings on either side of it but over which the public have or had no right of passage or access is a 'street' within the meaning of the Bombay Municipal Act.

"A number of authorities have been cited on both sides which appear in the notes of proceedings. It is contended on behalf of

the prosecution that section 3 (*w*) of the Bombay Municipal Act III of 1888, is not an exhaustive definition of the word 'street' but it is an extension of its ordinary, popular and natural meaning, and that the ordinary, popular and natural meaning implies a way or space having houses more or less contiguous on both sides, and that therefore the road in question is within the meaning of the section. It is contended on behalf of the defence that 'street' conveys an idea that the public ought to have a right of access and which right can be acquired either by dedication or prescription; which is not the case here. It is also contended that the words 'over which the public have a right of passage, &c.,' show that the legislature intended to refer to streets over which the public had a right of way inasmuch as even the extended meaning of the word is qualified by such a proviso.

"I submit that the road in question is a 'street' within the meaning of the Bombay Municipal Act. The word 'street' is to be taken in its ordinary, popular and natural sense as denoting a roadway having or intended to have buildings on either side, at all events on one side.

"The fact that under section 3 (*w*), which is an interpretation clause, street *includes* highway, &c., which would not ordinarily be described as streets does not prevent the word from having its ordinary, popular and natural sense. (*Pound v. Plumstead Board of Works*, L. R. 7 Q. B., pages 192—195.) The language of the definition in section 3, clause (*w*) is made to include certain other things but it does not exclude that which independently of such enactment would be a street. Then the question practically resolves itself into what the ordinary, popular and natural meaning of the word 'street' is. I submit that it is not confined to streets over which the public have acquired a right to pass or repass either by dedication or prescription. (*Vestry of St. Mary, Islington v. Barrett*, L. R. 9 Q. B. 283, 284; and *Midland Railway Company v. Watton*, L. R. 17 Q. B. D., pages 39, 40 and 42.)

"In this case there is a large block of land in the middle of the town. It is laid out in rows of houses with "ways" between them opening direct into a public street at one end. The owners

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and occupiers of these houses are taking advantage of the public roads and facilities afforded by Municipal Government. I submit that the 'ways' which provide access to these houses to and from the public road are private streets. They are certainly 'ways' in a city bounded on each side by houses and as such come within the definition of 'street' in the Imperial Dictionary, quoted with approval by Jessel M. R. in *Taylor v. Corporation of Oldham*, L. R. 4 Ch. D., page 408. This view is also supported by a reference to Stroud's Judicial Dictionary. In *George Robinson v. The Local Board for the District of Barton Eccles*, L. R. 7 App. Cas. at page 801, Earl of Selborne, L. C., said: 'In the natural and popular sense of the word street I should certainly understand a roadway with buildings on each side (it is not necessary to say how far they must or may be continuous or discontinuous)'. Obvious mischief, I submit, would be occasioned if such 'ways' were not held to be streets.

"*Kalidas v. The Municipality of Dhandhuka*, 1 L. R. 6 Bom., p. 686, and *Re Gulabdas Bhaidas*, 1 L. R. 20 Bom., which have been decided upon the definition of street in the District Municipal Act VI of 1878, and which have been cited by the defence seem to create some doubt and difficulty, but at the same time I submit that they are distinguishable."

At the commencement of the arguments, Mr. Justice Russell suggested that the question was not clearly framed by the Magistrate. His Lordship therefore formulated the question as follows :—

"Whether the vacant space in front of Mathurabai's house when and if laid out as a means of passage with houses on both or either side of it and if used as such by the occupiers of such houses and not by the public generally will constitute a 'street' within the meaning of the City of Bombay Municipal Act, 1888."

Raikes (acting Advocate General) instructed by *Unwalla and Phirozshah*, for the defendant :—We contend that the road marked "proposed road" is not a "street" within the meaning of the City of Bombay Municipal Act (Bombay Act III of 1888). The earliest meaning of the word "street" refers to the surface of the ground being prepared in a particular manner and the word has not lost that meaning. Speaking from a historical point of

view, the word "street" in the very first instance means a made road. Here the "proposed road" will not be a street unless it is made into a road. The mere fact that there are houses and there is a space between them will not make it a street.

The next point and the real point to consider is whether 'street' in the ordinary sense of the term does not connote the place to which the public have access. The "road" in this case does not come within the definition of the word "street" as given in section 3 (w) of the City of Bombay Municipal Act (Bombay Act III of 1888). Everything which is included in the definition of "street" is a place "over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years"

Counsel cited *Pound v. Plumstead Board of Works*⁽¹⁾; *Vestry of St. Mary, Islington, v. Barrett*⁽²⁾; *Taylor v. Corporation of Oldham*⁽³⁾; *Midland Railway Company v. Watton*⁽⁴⁾; *Robinson v. Local Board of Barton-Eccles*⁽⁵⁾; *Arter v. Vestry of Hammer-smith*⁽⁶⁾; *Queen v. Fullford*⁽⁷⁾; *Hall v. Corporation of Bootle*⁽⁸⁾; *Galloway v. Mayor and Commonalty of London*⁽⁹⁾; *Bourke v. Davis*⁽¹⁰⁾.

It comes down to this. What is a street? According to the ordinary connotation of the term, one of the things which the street connotes is the place to which the public have access, and this ingredient is absent in the present case.

Lowndes (instructed by *Crawford, Brown and Co.*) for the Municipal Commissioner:—The definition of the term "street" in the City of Bombay Municipal Act (Bombay Act III of 1888) is not exhaustive. It runs:—street "includes," etc. The fact that the term "includes" some things does not at all touch the ordinary meaning which the term bears. It is made to 'include' in Acts of Legislature only for convenience of expression. The Act defines "street," "public street" and "private street" side by side. In the first the term "includes" is used: whereas in the two latter terms the word "means" is used.

(1) (1871) L. R. 7 Q. B. 183, 192.

(2) (1874) L. R. 9 Q. B. 278.

(3) (1876) 4 Ch. D. 395, 408.

(4) (1886) 17 Q. B. D. 30.

(5) (1883) 8 App. Cas. 798.

(6) [1897] 1 Q. B. 646.

(7) (1864) 33 L. J. M. C. 122.

(8) (1881) 44 L. T. (N. S.) 873.

(9) (1866) L. R. 1 H. L. 34, 55.

(10) (1889) 44 Ch. D. 110.

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What is the ordinary meaning that is assigned to the word "street"? It is a road public or private having houses continuous or discontinuous on one or both sides. In the common use 'street' means a little bit of ground in front of one's house. It does not necessarily imply publicity: and it is immaterial whether it is public or private. Ordinarily, it means a roadway within town limits having houses at least on one side and it is immaterial whether it is public or private. Is there, then, anything in the City of Bombay Municipal Act, 1888, which says that the ordinary meaning should not be attached to the term "street"?

Raikes was heard in reply.

RUSSELL, J.:—This is a special case stated by the Acting Fourth Presidency Magistrate, Bombay, but inasmuch as the question as put by him did not exactly meet the case, the following question was formulated by the Court with the consent of the parties, *viz.*—

"Whether the vacant space in front of Mathoorabai's house when, and if, laid out as a means of passage with houses on both sides and when, and if, used as such by the occupiers of such house, and not by the public generally, will constitute a street within the meaning of the Bombay Municipal Act." (Bombay Act III of 1888).

The facts stated shortly are as follows:—

The Municipal Commissioner for Bombay laid a complaint against defendant Mathoorabai for an offence punishable under the Building bye-laws No. 42, she being the purchaser of a plot No. 15, from one Tribhovandas Mangaldas. It appears that this Tribhovandas owned a large plot of ground abutting on the south side of the Girgaum Back Road and about two years ago he divided this plot into 19 small plots and sold them to different purchasers. Each purchaser entered into a covenant in similar terms, *mutatis mutandis*, as Mathoorabai. She was the purchaser of plot No. 15, and covenanted with the vendor as follows:—

"And the purchaser doth hereby for the benefit of the owners and occupiers of all the other plots specified on the

said plan hereto annexed, covenant with the said vendor that she, the purchaser, shall not build upon or block in any way whatever and leave open to the sky such portion of the said piece of land as is marked as the "proposed road" on the said plan hereto annexed, and which contains by admeasurement 54 square yards and 66 hundredths of a square yard but shall use the same as a road only and shall at her own expense prepare and pave and metal and otherwise keep the same in proper repair and order and shall allow the owners and occupiers for the time being of the other plots specified on the said plan and their agents and servants and all and every other persons or person for the benefit and advantage of such owners and occupiers full and free right and liberty from time to time and at all times hereafter at his and their will and pleasure by night and by day and for all purposes to go, return, pass and repass with or without horses, carts, wagons and other carriages laden or unladen and also to drive cattle and other beasts in, through, along and over the said road to and from the said plot No. 15." The words above set out "and all and every other persons or person for the benefit and advantage of such owners and occupiers" give at all events a limited right of access to the public over the road marked, although we are told that the "proposed road" is to be, it appears, *a cul de sac*.

Mathoorabai being desirous of building a house on her plot No. 15, submitted plans and specifications to the Municipal Commissioner in April 1905. The Municipal Commissioner while disposing of the plans and specifications took amongst others the following objection:—

"That the building will be more than one and a half times the width of the street it abuts on".

The proposed street or road was to run in front of Mathoorabai's house and was to have houses on either side of it. But the public were to have no right of access over the said street or road. Notwithstanding the intimation of disapproval by the Municipal Commissioner, Mathoorabai continued her house and erected it to the height of 32 feet 9 inches; the width of the proposed road being 16 feet, this height was obviously more than one and half times the width of the street.

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Section 3 [clauses (w), (x) and (y)] of Bombay Act III of 1888 provides as follows :—

“(w) ‘Street’ includes any highway and any causeway, bridge, viaduct, arch, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years; and, when there is a footway as well as carriage-way in any street, the said term includes both.”

“(x) ‘Public street’ means any street heretofore levelled, paved, metalled, channelled, sewered or repaired by the Corporation, and any street which becomes a public street under any of the provisions of this Act.”

“(y) ‘Private street’ means a street which is not a public street.”

The main question argued by Mr. Raikes was that inasmuch as the public had and were to have no right of access over the “proposed road or street”, it did not fall within the definition of “street” as above set forth.

Mr. Lowndes for the Municipality contended on the other hand that the word “street” was not defined by clause (w) but “included (as was shown by the use of the word ‘includes’) any high-way and any cause-way,” etc., etc. The Act moreover had defined “public street” and “private street” in clauses (x) and (y) by using the word “means,” for these clauses say “public street” means* * * * and “private street” means. * * *

Now, firstly it is to be observed that “includes” is a phrase of extension, and not of restrictive definition. It is not equivalent to “means”, *The Queen v. Kershaw* (1); *The Queen v. Hermann* (2). But as said by Lord Watson:—“‘include’ is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used those words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things

(1) (1856) 6 E. & B. 999 at p. 1007.

(2) (1879) 48 L. J. M. C. 106; 4 Q. B. D. 284.

which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions." *Dilworth v. Commissioner of Stamps*⁽¹⁾. The draftsman of the Bombay Municipal Act was fully aware of the difference between "include" and "mean", and we are of opinion that he used the word "include" in the above clause (w) in order to enlarge the meaning of the word "street" which, having before him the example of various Judges in England, he was careful not to define. From this it follows that the word "street" must receive the ordinary common sense interpretation which (if we may use a colloquial expression) would be put upon it by "the man in the street".

Before however dealing with the numerous cases which were cited to us as to the meaning to be put on the word, we would point out that if the argument of the Advocate General were to prevail, the definition of "private street" would appear to be a contradiction in terms. For if "street" must in this Act always be associated with "publicity" then no street could be private.

That this is the right construction to be put upon the word "street" by itself, appears from the following cases:—In *Robinson v. Local Board of Barton-Eccles*,⁽²⁾ the Earl of Selborne L. C., at page 801 in dealing with the words in the statute "includes" and "shall apply to and include", says as follows:—"An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable; but to enable the word as used in the Act, when there is nothing in the context or the subject-matter to the contrary, to be applied to some things to which it would not ordinarily be applicable." Again he says (page 801) "In the natural and popular sense of the word 'street' . . . I should certainly understand a road-way with buildings on each

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(1) [1899] A. C. 99 at pp. 105--106.

(2) (1888) 8 App. Cas. 798.

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side (it is not necessary to say how far they must, or may be continuous or discontinuous)". Again Jessel M. R. in *Taylor v. Corporation of Oldham*,⁽¹⁾ says:—"The definition of a 'street' is thus laid down in the Imperial Dictionary: 'A street is properly a paved way or road; but in usage, any way or road in a city, having houses on one or both sides.' Now, tried by that test, this is a street: it has houses on both sides of it, and therefore, in common parlance, it is a street. It is really a street. Supposing that were wrong, I find 'street' is to include 'road' and this certainly is a road". Again in *Robinson v. Local Board of Barton-Eccles*, cited *supra*, Lord Blackburn says, page 809, that "street" in the ordinary and popular sense of the word, was a high-way with houses on each side. But in the case of *Corporation of Portsmouth v. Smith*,⁽²⁾ it was held by Brett M. R. that the word "street" when popularly used meant a thoroughfare bounded on one or both sides by houses. That case was affirmed in the *Mayor, etc., of Portsmouth v. Smith*⁽³⁾, in which Lord Blackburn delivered the first opinion. He did not take objection to the definition above given by Brett M. R. With regard to the remark of Brett M. R. above quoted it may be said that "road-way" ought to have been the word he should have used instead of "thoroughfare," for a *cul-de-sac* is a "street" and may be a "public street". See *Souch v. East London Railway Company*⁽⁴⁾ and *Davis v. Board of Works for Greenwich District*⁽⁵⁾.

With regard to the Bombay cases which were cited, *viz.*, *Kalidas v. The Municipality of Dhandhuka*,⁽⁶⁾ it need only be remarked (1) that the court there in question was not used as a thoroughfare but only as a means of access to the houses which surrounded it by persons who had business with the householders, (2) no reference was made to the definition of "street" in the Bombay District Municipal Act VI of 1873 which "shall include . . . any court, . . . whether a thoroughfare or not". Similar remarks apply to *In re Gulabdas Bhaidas*,⁽⁷⁾ while in the case of *The Ahmedabad Municipality v. Manilal Udenath*,⁽⁸⁾ in the issue sent down involved the question what con-

(1) (1876) 4 Ch. D. 395 at p. 408.

(5) [1893] 2 Q. B. 219.

(2) (1883) 13 Q. B. D. 184.

(6) (1882) 6 Bom. 686.

(3) (1885) 10 App. Cas. 364.

(7) (1894) 20 Bom. 83.

(4) (1873) L. R. 16 Eq. 108.

(8) (1894) 20 Bom. 146.

stitutes a "public street" within the contemplation of Bombay Act VI of 1873; and "public street" had not been defined in that Act as it has been in the Bombay Municipal Act, 1888.

That being so, we have come to the conclusion that the question we have to decide as formulated by us, must be answered in the affirmative. We would moreover wish to cite the very apposite passage in *Taylor v. Corporation of Oldham*,⁽¹⁾ at page 408. Jessel M. R. says as follows:—"The owners of these private courts and alleys are, of all people in the world, the most averse to laying out money in sanitary works. It is in these places that the poor live, the very people who suffer most from the want of sewerage and drainage, which are so requisite for public health. Is it to be imagined that the Legislature intended to except such places as these from the operation of the Act? I should say if the Act were passed for anybody, it must have been meant to include those owners, who, for the sake of gain and acquiring high rents in proportion to the annual value of the wretched tenements they allow the poor to occupy, neglect ordinary and necessary sanitary precautions. If I were to interpret it by what I might think to be the mind of the Legislature, I should suppose that the first people to be included would be the owners of these crowded courts and alleys, over which the public have no strict rights whatever, but which are intended to be used for the dwellings of the poor, and are unprovided with what, according to modern science, is known to be absolutely necessary for their well-being."

We have no evidence before us of the class of persons who are to occupy Mathoorabai's house, but whether they be poor or well-to-do, they are equally entitled to what in Bombay is "absolutely necessary for their well-being," namely, light and air, as for many purposes the Bombay City Municipal Act is a Public Health Act.

The case accordingly will be remanded to the Magistrate to be dealt with by him according to the law in the light of the above judgment.

BATTY, J.—I have nothing to add.

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(1) (1876) 4 Ch. D. 395, p. 408.

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APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Beaman.*

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June 25.

NARAYAN SHANKAR (ORIGINAL DEFENDANT 1), APPLICANT, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), OPPONENT.*

Civil Procedure Code (Act XIV of 1882), section 17 clause (c)—Time of the defendants not residing within the jurisdiction of the Court—Leave given after institution of the suit.

Where one out of three defendants did not reside within the jurisdiction of the Court and leave to sue was given after the institution of the suit,

Held, that under section 17 clause (c) of the Civil Procedure Code (Act XIV of 1882) it was not necessary that the leave of the Court must have been first given. The leave, though subsequent, was good.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of C. A. Kincaid, District Judge of Poona, in original suit No. 3 of 1905.

One Narayan Shankar Rajvade entered into an agreement with the Secretary of State for India in Council for being trained up in the Imperial Forest School at Dehra Dun as a Government stipendiary forest student. Under the said agreement, which was dated the 10th January 1903 and which was executed at the village of Wani, Taluka Dindori in the Nasik District, the Secretary of State for India engaged to educate Narayan Shankar Rajvade at the said school in all matters relating to forest science, forest work and forest administration and also to pay him Rs. 40 per month, and Narayan Shankar Rajvade undertook as the principal obligor with two sureties, namely, Vitthal Khanderav Devdhar and Vinayak Ganesh Apte, both residing at Poona, to indemnify the Secretary of State against losses which he might suffer by reason of his (Narayan's) giving cause for dismissal from the school and further to pay to the Secretary of State all sums spent by him in respect of his (Narayan's) education at the school. Narayan attended the school for some months and, by a resolution passed

* Application No. 325 of 1905 under extraordinary jurisdiction.

by a meeting of the officers of the school on the 3rd December 1903, he was removed from the school on account of his insufficient diligence and promise. The Secretary of State, thereupon, brought a suit against him as defendant 1 and his two sureties as defendants 2 and 3 in the District Court at Poona for the recovery of Rs. 505-14-10 alleged to have been spent for the education of defendant 1 at Dehra Dun. The suit was instituted on the 3rd February 1905.

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Defendant 1 replied on the 15th March 1905 that he was removed from the school but not for insufficient diligence and promise as alleged in the plaint, that the District Court at Poona had no jurisdiction to entertain the suit inasmuch as (1) the said agreement was not entered into within the jurisdiction of that Court, (2) the defendant was actually and voluntarily residing at Dehra Dun and (3) the money was payable under the contract at that place.

The pleas of defendants 2 and 3 were immaterial.

On the said pleadings issues were framed in June 1905, and subsequently, on the 15th July 1905, the plaintiff applied for leave to institute the suit under section 17 clause (c) of the Civil Procedure Code (Act XIV of 1882) on the ground that two of the defendants, namely, defendants 2 and 3 lived within the jurisdiction of the Court. On the 29th August 1905, the leave sought for was granted.

Defendant 1, thereupon, applied under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) for setting aside the order granting the said leave on the grounds that the leave should have been asked for prior to the institution of the suit, that the Court had no jurisdiction to grant leave after the issues were framed and that the defendant having expressly pleaded want of jurisdiction in his written statement there was no acquiescence on his part in the institution of the suit.

A *rule nisi* having been issued requiring the plaintiff to show cause why the said order should not be set aside,

P. P. Khare appeared for the applicant (defendant 1) in support of the rule:—We executed the agreement at Wani in the

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Násik District and are at present residing and voluntarily working for gain at Dehra Dun where we have secured Government employment. The District Court at Poona had, therefore, no jurisdiction to entertain the suit against us. The plaintiff knew full well that we were living at Dehra Dun because in the plaint we are described as living at that place and the summons was served upon us there. The plaintiff should have therefore applied for leave to institute the suit at Poona at the very commencement under section 17 clause (c) of the Civil Procedure Code. There is a similar provision in clause 12 of the Letters Patent and it has been held that such leave must be obtained prior to the institution of the suit: *DeSouza v. Coles*⁽¹⁾, *Hadjee Ismail v. Hadjee Mahomed*⁽²⁾, *Rampurab v. Piemsukh*⁽³⁾. We, therefore, submit that the District Court at Poona had no jurisdiction to grant the leave. The order granting the leave should be set aside and the suit should be dismissed.

M. B. Chaulal (Government Pleader) appeared for the opponent (plaintiff) to show cause:—The language of clause 12 of the Letters Patent makes it clear that the leave must be obtained prior to the institution of the suit but it is not so under section 17 clause (c) of the Civil Procedure Code. The latter part of the proviso deals with the acquiescence of the defendant in the institution of the suit. Such acquiescence can only arise after the institution of the suit and not prior to it. Further, the defendant has not complied with the provisions of section 20 of the Civil Procedure Code, and so he must be taken to have acquiesced in the institution of the suit. Therefore he cannot now plead want of jurisdiction: *Ramappa v. Ganpat*⁽⁴⁾. The permission requisite for suing or being sued under section 30 of the Civil Procedure Code can be obtained subsequent to the institution of the suit: *Fernandez v. Rodrigues*⁽⁵⁾, *Chennu Menon v. Krishnan*⁽⁶⁾.

A certificate under the Pensions Act and a conciliator's certificate under the Dekkhan Agriculturists' Relief Act are allowed.

(1) (1868) 3 Mad. H. C. R. 384.

(2) (1874) 13 Beng. L. R. 91.

(3) (1890) 15 Bom. 93.

(4) (1905) 7 Bom. L. R. 289.

(5) (1897) 21 Bom. 784.

(6) (1901) 25 Mad. 399.

to be produced after the institution of the suit. So by analogy the leave to sue may be obtained after the suit is launched.

Assuming that the order granting leave is wrong, it is a mistake in law and it cannot be interfered with under section 622 of the Civil Procedure Code.

P. P. Khare, in reply :—Although the word “first” which occurs in clause 12 of the Letters Patent is wanting in clause (c) section 17 of the Civil Procedure Code, still the language of the section clearly shows that the institution of the suit must be subsequent to the grant of the leave. As regards analogy of section 30 of the Code the rulings in *Jan Ali v. Ram Nath Mundul*⁽¹⁾ and *Lutifunnissa Bibi v. Nazirun Bibi*⁽²⁾ show that permission under section 30 must be obtained prior to the institution of the suit.

Cases of certificates under the Pensions Act and the Dekkhan Agriculturists' Relief Act bear no analogy. The certificates referred to in those Acts are to be obtained from the Collector and the conciliator respectively, that is, from persons other than the Judge himself, while the leave contemplated under section 17 clause (c) of the Code is to be obtained from the Judge, that is, the Court in which the suit is to be instituted.

When a Ruling Chief is to be sued in a British Court, permission of the Governor General is necessary under section 433 of the Civil Procedure Code. It has been held in *Chandulal v. Awad bin Umar Sultan*⁽³⁾ that such permission must be obtained prior to the institution of the suit. This case deals with the question of jurisdiction and the present case also raises the same question.

As regards acquiescence under section 20 of the Code, we contend that the question of jurisdiction was raised by us at the very outset in our written statement. The plaintiff was fully aware of this and issues were subsequently raised. Although a regular application was not made under section 20, still in fact all the requisites had been substantially complied with. Therefore even now we should be allowed to apply under section 20

(1) (1881) 8 Cal. 32.

(2) (1884) 11 Cal. 33.

(3) (1896) 21 Bom. 351.

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for the convenience of the parties. The ends of justice will be best served by instituting the suit in some Court having jurisdiction at Dehra Dun as it will be necessary for us to examine witnesses residing at that place.

In granting the leave the Court at Poona has taken cognizance of the suit which was not within its jurisdiction. The Court has thus committed error in exercising jurisdiction and its order can be interfered with under section 622 of the Civil Procedure Code.

JENKINS, C. J.:—A suit has been brought against three defendants in the District Court of Poona.

Two of these defendants at the time of the institution of the suit were actually and voluntarily residing within the local limits of the Poona Court.

The third was not.

Since the institution of the suit, an application has been made on behalf of the plaintiff for leave under section 17(c) of the Civil Procedure Code.

That leave was granted and it is to the order granting that leave that exception is now taken by the defendant affected thereby. He maintains that leave could not be granted after the institution of the suit.

No doubt, the words of the section are susceptible of that meaning, but the concluding provision as to acquiescence makes it clear that a defect at the institution can be subsequently cured, for, obviously, there could be no acquiescence at the time of the institution. And so we think, there is no necessity for reading the words of the provision in such a way as to say that the leave of the Court must have been first given. Such a conclusion would lead to great inconvenience, and possibly hardship, as in cases where the plaintiff honestly and reasonably believed that all the defendants were residing within the jurisdiction. Therefore, we hold that the leave, though subsequent, was good and the rule must be discharged with costs.

Rule discharged.

G. B. R.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Beaman.*

MULCHAND DAGADU (ORIGINAL MONEY DEPOSITOR), APPLICANT, *v.*
GOVIND GOPAL AND TWO OTHERS (ORIGINAL AUCTION-PURCHASER,
JUDGMENT-CREDITOR AND JUDGMENT-DEBTOR), OPPONENTS.*

1906.
July 25.

*Civil Procedure Code (Act XIV of 1882), Chapter XIX, section 310A—
Attachment—Private sale—Application to set aside sale—Sale under
attachment.*

Section 310A of the Civil Procedure Code (Act XIV of 1882) is applicable to a purchaser subsequent to attachment and prior to sale under the attachment.

Where there has been a subsequent sale following on the attachment, a person answering this description is one whose immoveable property has been sold under Chapter XIX of the Code.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against an order passed by J. J. Heaton, District Judge of Násik, dismissing an appeal against an order of K. G. Kittur, Subordinate Judge of Pimpalgaum, granting a review.

One Punamchand Rupset in execution of a money decree attached certain immoveable property belonging to his judgment-debtor Mahadu valad Hari. The judgment-debtor being an agriculturist, the decree was sent for further execution to the Collector. While the attachment was pending, the property was sold by the judgment-debtor to Mulchand Dagdu, a minor, by a registered sale-deed, dated the 10th September 1901. Subsequently the Collector sold the property in execution of Punamchand's money decree and it was purchased at the auction-sale by one Govind Gopal Kulkarni on the 3rd May 1904. Mulchand Dagdu having, thereupon, come to know of the auction-sale, applied to the Collector on the 21st May 1904 to set aside that sale and offered to deposit the decretal amount but the Collector referred him to the Court which passed the decree. As the Court was then closed for the summer vacation, Mulchand Dagadu applied under section 310A of the Civil Procedure

* Application No. 61 of 1905 under extraordinary jurisdiction.

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Code (Act XIV of 1882) when the Court re-opened on the 6th June following and also deposited in Court the necessary amount. The Court accepted the deposit and set aside the auction-sale without issuing notice to the auction-purchaser. The auction-purchaser then applied to the Court on the 12th July 1904 to revoke the order setting aside the auction-sale on the ground that Mulchand Dagdu had no right to come in under section 310A of the Civil Procedure Code. On the said application the Court issued notices to all the parties concerned. At the hearing of the application the judgment-debtor Mahadu impugned the sale to Mulchand on the ground that he had not received the consideration for it. The Court framed issues but without recording findings on them reviewed its order setting aside the auction-sale on the ground that it was passed without issuing notice to the auction purchaser Govind Gopal and held that Mulchand was not entitled to have the auction-sale set aside under section 310A of the Civil Procedure Code. It therefore allowed the auction-sale to stand and directed Mulchand Dagdu to establish his right under his registered sale-deed in a regular suit.

Against the said order Mulchand appealed to the District Court which dismissed the appeal holding that the order cannot be said to have been made under section 244, nor was it appealable under section 629 of the Civil Procedure Code.

Mulchand, thereupon, preferred an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code).

Inverarity (with *R. R. Desai*) appeared for the applicant (private purchaser):—The Subordinate Judge was wrong in holding that we have no right to come in under section 310A of the Civil Procedure Code. Our only remedy lay under that section. It does not say anything with respect to a judgment-debtor: *Erode Manikkoth v. Puthiedeth*⁽¹⁾. Even section 276 of the code does not avoid our purchases: *Abdul Rashid v. Gappo Lal*⁽²⁾.

G. B. Relz appeared for the opponent 1 (auction-purchaser):—Under section 310A of the Code it is the right of the judgment-debtor to apply to set aside the Court-sale. A purchaser at a

(1) (1902) 26 Mad. 365.

(2) (1898) 20 All. 421.

private sale is not the judgment-debtor and he cannot present such an application: *Ramchandra v. Rakhmabai*⁽¹⁾.

[JENKINS, C. J.:—The sale in that case was prior to the attachment and not subsequent as in the present case.]

The decree under which the property was attached in the present case was merely a money decree and mere attachment under such decree cannot place the purchaser under a private sale in the shoes of the judgment-debtor.

S. R. Bakhle appeared for the opponent 3 (judgment-debtor).

Opponent 2 (judgment-creditor) did not appear.

JENKINS, C. J.:—This is an application to us under section 622 of the Civil Procedure Code.

The only question is whether the Subordinate Judge has committed an error within the scope of that section in holding that section 310A of the Civil Procedure Code was not applicable to a purchaser subsequent to attachment and prior to sale under that attachment. In our opinion, where there has been a subsequent sale following on the attachment, a person answering this description is one whose immoveable property has been sold under the Chapter.

In deciding otherwise the learned Judge has failed to exercise a jurisdiction which was vested in him.

The decision of the learned Judge that the parties should determine the matters at issue between them in a suit under section 310A is, in our opinion, erroneous.

The rule is therefore made absolute; and the case must be sent back to the Subordinate Court for determination in the light of these remarks.

Costs will follow the result.

Rule made absolute.

G. B. R.

(1) (1898) 23 Bom. 450.

ORIGINAL CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Batty.*

1906.
June 15.

RAGHUNATH MULCHAND (ORIGINAL PLAINTIFF), APPELLANT, v. VARJIVANDAS MADANJ. AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Law of Native State—Law in British India—Difference—Burden of proof—Trustee—Cestui que trust—Confidential relation.

It lies on him who asserts it to prove that the law of the Native State differs from the law in British India, and in the absence of such proof it must be held that no difference exists except possibly so far as the law in British India rests on specific Acts of the Legislature.

Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the Court that the person by whom the benefits have been conferred had competent and independent advice in conferring them. This applies to the case of trustee and *cestui que trust*.

Vaughton v. Noble⁽¹⁾ and *Liles v. Terry*⁽²⁾ followed.

APPEAL from Chandavarkar, J.

One Jivan Karsanji died at Porebunder in Káthiáwár on the 22nd March 1892, leaving him surviving a widow Mankuvarbai. At the time of his death the deceased was possessed of considerable moveable and immoveable property including eleven shares of the Manekji Petit Manufacturing Company, Limited. The said eleven shares were registered in the name of Mankuvarbai's brother Madanji Sundarji, otherwise known as Madanji Dharamsi, who managed the affairs of the deceased during his life-time at Bombay and continued to do so afterwards for his widowed sister Mankuvarbai. Out of the said eleven shares, two were sold by Mankuvarbai and she appropriated the proceeds thereof to her own use. The remaining nine shares were also sold and with the proceeds of the sale other nine shares of the same Company were purchased at a less price. Out of the said nine shares two stood in the name of Jagjivan Valji, a member of the firm of Valji Ranchod, with whom the deceased had accounts and

* Appeal No. 1414 of 1905: Original Suit No. 336 of 1904.

(1) (1861) 30 Beav. 34 at p. 39.

(2) [1895] 2 Q. B. 679 at p. 686.

the remaining seven stood in the name of the said Madanji Sundarji.

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Mankuvarbai died on or about the 24th May 1900 leaving a will dated the 2nd April 1900. On or about the 15th October 1900 the said Madan Sundarji also died and the property of the deceased Jivan Karsanji, which had been in his custody and management for and on behalf of Mankuvarbai including the said shares, remained in the possession of his sons, defendants 1 and 2, who asserted ownership to the property under Mankuvarbai's will. Thereupon the plaintiff as the constituted attorney of his mother Rambhatai, the niece (paternal aunt's daughter) of Jivan Karsanji, who claimed to be the reversionary heir, obtained to himself the grant of letters of administration for her use and benefit to the estate of the deceased Jivan Karsanji and brought the present suit, among other things, to establish title to the said shares alleging that Mankuvarbai had no authority to will them away in defendants' favour.

Defendants 1 and 2 denied that the said shares formed any portion of the estate of Jivan Karsanji at the death of Mankuvarbai and contended that she, during her life-time, that is, in May 1898, gave by way of gift to their father Madan Sundarji the two shares which stood in the name of Jagjivan Valji; that in the month of June following she made a gift of the remaining seven shares to their father for the benefit of himself and the defendants; that out of the nine shares one was sold by their father in February 1900 and the proceeds thereof were spent partly for his own purpose and that they were in possession of the remaining eight shares as owners.

The Manekji Petit Manufacturing Company, Limited, and the Hongkong and Shanghai Manufacturing Corporation were joined as defendants 3 and 4.

The suit was heard by Chandavarkar, J., who dismissed it holding that the gift of the shares to the defendants' father was proved. In the course of the judgment His Lordship observed :—

“ Now I come to the most important point in this case and that is as to the gift set up by the defendants 1 and 2. I do not intend to give my reasons at length upon that issue, because the effect of the whole evidence in my opinion

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is that the gift set up is proved. I accept as reliable the evidence of Tulsidas Jugjivan. His demeanour was most satisfactory. He gave his evidence without any bias and with considerable presence of mind, and appeared to speak the truth. He is a disinterested and respectable witness, and has no reason whatever for inventing a story and helping the first and second defendants.

"Then comes the evidence of the two defendants. That also was to my mind satisfactory, especially that of the second defendant Vandravandas, who exaggerated nothing; but in some respects he admitted facts especially as to the account book of his father though he knew that they might possibly go against his case. I regard him too as a reliable witness.

"Next the probabilities also, in my opinion, are in favour of the gift. Mankuvarbai and Madanji were sister and brother. The sister had no children. They lived together in Bombay. It seems to me quite in the nature of things that she made the gift in favour of her brother and his sons. In her will there is no express mention of the shares. By itself this circumstance would not be of importance because Mr. Vicaji (for the plaintiff) rightly pointed out the lady owned one share in the Coorla Mills and one in the Sassoon Mills, and there is no express reference to them either in the will. But the circumstance such as it is appears to me seems to tell in favour of the gift. The reason why the two shares, one of the Coorla and the other of the Sassoon Mill, were not mentioned might be that the number was so small and insignificant that it was considered hardly worth specific mention. Had she been still owner of eleven shares she would have made it a point to mention them in the will. Under these circumstances the fact that there is no reference to the shares in the will is evidence in favour of the gift. The evidence also satisfies me that Madanji Sundarji has dealt with the shares as his own after the date of the gift. He realized the first dividend. He paid one dividend into the account of Jivan with Runchhod Walji. That substantially corroborates the evidence of the witnesses to the gift. It is also clear that Jivan's indebtedness to the firm of Runchhod was reduced so that a balance of Rs. 41 was left. Afterwards Madanji Sundarji sold these shares and purchased new shares in his own name. Upon the whole I have no hesitation in holding that the gift is proved and that it was completed by the fact that Madanji Sundarji dealt with the shares as his own.

"With reference to Mr. Vicaji's argument that after the gift Rs. 200 were debited to Jivan's account, I do not attach any importance to that fact because neither of the defendants was cross-examined as to this. It must be remembered that Madanji continued to be the manager of this lady Mankuvarbai and he must have debited to that account the said sum.

* * * * *

"Then Mr. Vicaji, for the plaintiff, contended that the gift was not valid and binding because it is a gift by a lady to her brother who was her agent. His argument is that Madanji, the donee, stood in a fiduciary relation to the

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donor, his sister, and that, therefore, the gift should not be upheld because the onus being upon them, the defendants have not proved that the lady fully understood what she was doing, that it was explained to her and that she had independent advice. As to this contention, I should observe at the outset that it was only in his concluding address in reply to the Advocate General's that Mr. Vicaji intimated his case. I never understood till then that that was the case of the plaintiff. It was not so put in the opening of the case by the learned counsel and during the whole hearing or when the 9th issue was raised no specific ground was given except that the gift even if proved was not completed by possession. But even supposing that the issue was raised in that particular sense which Mr. Vicaji attaches to it, the first question is—has the plaintiff proved that Madanji Sundarji stood in a position of active confidence to Mankuvarbai so as to throw the burden of proving the good faith of the transaction on the defendants? All that I find proved is that they were brother and sister, that the brother had her shares in his name and managed her affairs for her. He was, in short, her manager or agent for the purpose of realizing the dividends and paying them to her or accounting for them to her. There was no special confidence created to bring the transaction within the principle of section 111 of the Indian Evidence Act. See *Boo Jinatboo v. Sha Nagar Valab Kanji*⁽¹⁾. But assume that section 111 applies. The evidence as it stands leaves no doubt about the good faith of the transaction. Mankuvarbai was a widow without children. She lived with her brother and to her his children were hers. She makes the gift after deliberation; there is no secrecy or haste about it. The evidence as it stands suggests nothing suspicious. There was nothing confused or complicated about the transaction. Mankuvarbai was not a *pardanashin*. So far as can be judged, she was intelligent though uneducated. The transaction originated from her; not from her brother. There was no inducement held out to her. The only thing is that there is no evidence that any professional adviser was consulted. But what was there for the professional adviser to advise in a transaction so simple and so natural? What undue influence was used? There was no cross-examination whatever suggesting anything of bad faith in the gift. Under these circumstances I find as a fact that defendants have discharged the onus that lay on them under section 111 of the Evidence Act, assuming that the onus did so lie."

The plaintiff appealed urging *inter alia* that the lower Court should have held that Madan Sundarji stood to Mankuvarbai in a fiduciary relation and a position of special confidence, and that under such circumstances the said alleged gift (if made) having been made without independent advice and it not having been shown that she properly understood the effect of the alleged gift,

(1) (1886) 11 Bom. 78 at p. 83.

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the said alleged gift should not be given effect to or held binding or operative.

The appeal was argued before Jenkins, C. J., and Batty, J., who, on hearing arguments, settled the following issues for determination :—

(1) Whether at the time of the alleged gift of the two shares Nos. 3523 and 3760 by Mankuvarbai to Madanji the said Madanji was not trustee of the said shares for, or otherwise in a fiduciary relation with regard to the same to, the said Mankuvarbai and the person claiming under Jivan Karsan or any and which of them ?

(2) Whether, if so, the alleged gift was valid in law and conferred any and what rights in the said shares on the said Madanji ?

(3) Whether at the time of the alleged gift of the seven shares Nos. 1684 to 1690 by Mankuvarbai to Madanji the said Madanji was not trustee of the said shares for, or otherwise in a fiduciary relation with regard to the same to, the said Mankuvarbai and the person claiming under Jivan Karsan or any and which of them ?

(4) Whether, if so, the alleged gift was valid in law and conferred any and what rights in the said seven shares (a) on the said Madanji and (b) on the defendants 1 and 2 ?

(5) Whether if and so far as the said gift was intended to confer a beneficial interest on the defendants 1 and 2, it was not invalid in law having regard to the relationship between the said Madanji and the defendants 1 and 2 and the position in which the said Madanji stood with regard to the said seven shares to the said Mankuvarbai and the person claiming under Jivan Karsan ?

(6) Whether the said alleged gift was not invalid in law as an attempt by Mankuvarbai to make a trust of a merely beneficial interest under a subsisting trust and without transferring the trust property to the trustee ?

Evidence on the said issues was recorded by Batty, J., and the case came on for argument before the Court of Appeal.

Strangman with *Raikes*, acting Advocate General, for the appellant (plaintiff) :—We first contend that the factum of the gift is not proved. There is no documentary evidence to establish the gift and the gift is inconsistent with the will of Mankuvarbai. Further it is inconsistent with the previous statements of Tulsidas on whose evidence the lower Court held that the gift was proved. Granting that the gift was made, it is void because the donee was the trustee of the shares. Under section 53 of the Trusts Act, the trustee cannot purchase the trust property or

become a mortgagee or lessee without the sanction of the Court; *a fortiori*, therefore, he cannot take a gift. The point does not admit of any elaboration: *Vaughton v. Noble*⁽¹⁾, *Lewin on Trusts*, p. 305 (10th Edn.). Assuming section 53 does not apply, the gift is void in equity because no independent and competent advice was taken by the *cestui que trust* before making the gift: *Liles v. Terry*⁽²⁾, *Wright v. Carter*⁽³⁾, *Hatch v. Hatch*⁽⁴⁾, *Rhodes v. Balle*⁽⁵⁾. The onus lies on the defendants: section 111 of the Evidence Act, section 16 of the Contract Act. The evidence produced only shows that Mankuvarbai expressed her intention to several persons of making the gift, but mere expression of such intention cannot amount to taking independent and competent advice. We further contend that the evidence with respect to the expression of the lady's intention is not reliable.

Palshah with *Inverarity* for the respondents (defendants):—No ground has been made out to disturb the finding of fact that the gift of the shares is proved. Section 53 of the Trusts Act does not expressly refer to gifts and does not apply: *Anglo-Indian Codes*, Vol. I, p. 832. Even if it applies to gifts, the gift of two shares standing in the name of Jagjivan Valji is not affected because in respect of them our father was neither trustee nor in active confidence, nor in any fiduciary relation. Our father was not in possession of those shares for many years before the gift was made. With respect to the remaining seven shares our father was not in active confidence so as to bring the case within the pale of section 111 of the Evidence Act.

[JENKINS, C. J.:—Is not the transaction now governed by the amended section 16 of the Contract Act?]

That section lays down the law inunciated in *Hunter v. Atkins*⁽⁶⁾. We admit that the amended section 16 of the Contract Act applies and the onus lies on us to prove that there was no undue influence. The cases relied on are distinguishable from the present. The gift was made by a sister to her brother and his sons who were in needy circumstances and whom she wished

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(1) (1861) 30 Beav. 34, 35.

(2) [1815] 2 Q. R. 679.

(3) [1905] 1 Ch. 27.

(4) (1804) 9 Ves. 292.

(5) (1866) L. R. 1 Ch. 252.

(6) (1832) 3 Myl. & K. 113 at pp. 134, 135.

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to provide for during her lifetime. Long before the gift was made she spoke about the matter to several of her relations who all approved of the intended gift. All this time the donee was away from the donor and was not in a position to influence her mind. These circumstances rebut the presumption of undue influence: *Huguenin v. Baseley*⁽¹⁾. In *Vaughton v. Noble*⁽²⁾ the bargain was an immoral one and the observations that trustees cannot accept gifts from *cestui que trust* was a dictum. In the present case there was delivery in fact. The share certificates were actually handed over to the donee.

JENKINS, C. J. :—The plaintiff, as the constituted attorney of his mother Rambhabai, has obtained a grant to himself of letters of administration to the estate of Jivan Karsanji deceased for his mother's use and benefit, and he has brought this suit to establish, amongst other things, title to certain shares in the Manekji Petit Manufacturing Company, Limited, as forming part of that estate.

It is conceded that the shares were bought with the proceeds of other shares in the same Company, which at one time formed part of Jivan Karsanji's estate, and the only defence made before us is that there was a gift of those shares which displaces the title set up by the plaintiff.

The question, therefore, on this appeal is, whether the gift has been established as a fact, and, if so, whether the gift is valid in law.

Jivan Karsanji died on the 22nd of March 1892 intestate and without issue at Porbunder in Káthiáwár, leaving a sole widow named Mankuvarbai.

Part of his estate consisted of eleven shares in the Manekji Petit Manufacturing Company, Limited.

Two of these shares were sold by the widow Mankuvarbai in her lifetime, and we are now only concerned with the title to the remaining nine shares, or more properly the nine shares in the Manekji Petit Manufacturing Company, Limited, bought with the proceeds of sale of the nine shares which had belonged to Jivan Karsanji in his lifetime.

(1) (1867) 14 Ves. 273.

(2) (1861) 30 Beav. 34, 39.

Of these nine shares two stood in the name of Jagjivan Walji from 1887 down to the date of the alleged gift to which I will hereafter refer.

The remaining seven shares stood in the name of Madanji Sundarji who is also known as Madanji Dharamsey.

It is the defendant's case that the two shares, which stood in the name of Jagjivan Walji, were transferred by way of gift to Madanji Sundarji in the month of May 1898, and that the seven shares standing in Madanji Sundarji's name were in the month of June 1898 given to him for the benefit of himself and his two sons, the first two defendants.

The alleged donor was Mankuvarbai, Jivanji's widow, and the sister of Madanji Sundarji.

The two shares Nos. 3523 and 3760 remained in the name of Jagjivan Walji up to the early part of May 1898.

On the 2nd of May Jagjivan Walji executed a transfer of these shares in favour of Dharamsey Sheshkaran.

On the 11th of May this transfer was registered in the Company's books.

It now appears that this transfer was, by way of security, for moneys advanced to the firm of Walji Ranchhod, of which Jagjivan Walji was a member.

On the 16th of May, Rs. 6,000 were credited to the firm of Walji Ranchhod in the books of Dharamsey Sheshkaran, the two shares were redeemed, and by a document dated the 20th May 1898 and registered in the Company's books on the same date, these shares were transferred to Madanji Sundarji.

It is the case of the first and the second defendants that prior to this Mankuvarbai had handed over the certificates of these shares to Madanji Sundarji by way of gift, and that the legal transfer was the completion of this transaction.

According to the dates as they have now been ascertained, this delivery of certificates must have taken place, if at all, on the 17th of May.

According to the case of the first two defendants the certificates of the seven shares were in like manner delivered by

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Mankuvarbai to Madanji Sundarji in the early part of June by way of gift. There is oral evidence in support of these two gifts, and on the strength of it Mr. Justice Chandavarkar has held both to be established.

In accordance with this view the suit was dismissed and the plaintiff was ordered to pay the first and second defendants their costs of the suit.

From this decree the present appeal has been preferred.

Before us two points only have been urged. First, that the gifts have not been proved in fact, and, secondly, that if proved, they were invalid inasmuch as Madanji Sundarji was in a position of confidence towards his sister who had no independent advice.

It is to be noticed that the gifts are alleged to have been made in Porbunder, a Native State of Káthiáwár.

No evidence has been led before us nor has any argument been addressed to us as to the law that governs in that State, and it has been throughout assumed that a widow in Porbunder has a power of disposition by gift *inter vivos* over shares that have devolved on her as the heiress of her husband, and that the law of that State imposes no formality in the case of gifts which has not been observed in this case. In the circumstances, I think, we must deal with this gift on the lines on which the case has throughout been conducted, and limit ourselves to a consideration of the only two points that have been contested.

In holding in favour of the gifts Chandavarkar, J., relied principally on the oral evidence of Tulsidas Jagjivan by whom he manifestly was most favourably impressed. Next he relied on the testimony of the two defendants, Vurjivandas and Vandravandas, which to his mind was satisfactory. And finally he considered the probabilities were in favour of the gift.

Now it is clear that on the lines on which this case has been fought, if the learned Judge's appreciation of the oral evidence is accepted, the factum of the gift has been established.

Has the appellant adduced sufficient reasons for justifying us in holding that the oral evidence has been misappreciated?

I think not. What has been principally relied on is the admission by Tulsidas on his further examination in the course of this appeal that he misplaced the date on which the certificates of the two shares were delivered to Madanji Sundarji.

Before Chandavarkar, J., he said "My father died on the 15th of Vaisakh Shudh Samvat 1954 (*i.e.*, 6th May 1898). Three or four days after that I handed over the shares and transfers to Mankuvarbai."

On his examination in the course of this appeal he said: "Premji Dharamsi's affidavit has been brought to my notice. . . . Having read it I do not adhere to my former deposition that the first gift was made of the two shares four or five days after the death of my father. Now I say it was ten or twelve days after my father's death."

As I have already said, the gift must have taken place, if at all, on the 17th of May and that corresponds with the altered statements.

No doubt there is a variation in Tulsidas' story, but seeing that he was deposing to events said to have occurred in 1898, I do not regard the departure from his original story as so serious as to throw complete discredit on it, and Mr. Justice Batty, before whom Tulsidas was examined on the second occasion, does not think that the examination before him should displace the estimate of his evidence formed by Chandavarkar, J.

Both sides claim that the surrounding circumstances aid them.

The plaintiff points to the failure of the defendants to formulate a clear and distinct case from the first and would make much of the affidavit sworn by Varjivandas in Suit 657 of 1900.

He claims, too, as strongly favouring his view, the dispositions made by Mankuvarbai's will and the absence of any writing evidencing the gift.

The defendants, on the other hand, rely on the absence from the will of any reference to the shares, and on Madanji's dealing with the shares and their dividends, pointing out that one share had been sold and that except the dividends accrued prior to the gift or very shortly after, none had been credited to Mankuvarbai.

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All these circumstances were before Chandavarkar, J., when he formed his favourable estimate of the defendant's oral evidence, and giving to them every consideration they do not in my opinion justify the conclusion that Chandavarkar, J., has erred in accepting that oral evidence as true.

Therefore I hold that the factum of the gifts is established.

But can the gifts be upheld? It is urged for the plaintiff that they are vitiated by the fiduciary relation in which Madanji stood towards Mankuvarbai.

This point was apparently not much elaborated before Chandavarkar, J., and though it undoubtedly was taken, it was taken without success.

Before this Court much has been made of this aspect of the case, and that the parties might not be prejudiced they were permitted to go into further evidence which was recorded by Batty, J.

Now here again nothing is proved as to what the law is in Porebunder State, so that we must rest on the principle that it lies on him who asserts it to prove that the law of the Native State differs from ours, and in the absence of such proof we must hold that no difference exists except possibly so far as the law here rests on specific Acts of the Legislature.

First, then, did Madanji stand in a fiduciary relation towards Mankuvarbai which might affect the validity of the gift?

Chandavarkar, J., held that "there was no special confidence created to bring the transaction within section 111 of the Indian Evidence Act."

But this conclusion, in my opinion, gives the go-bye to the undoubted fact that the seven shares were vested in Madanji on a specific trust in favour of Mankuvarbai, and the evidence which shows that he received the dividends and managed for her so far at any rate as those seven shares concerned. It in no way detracts from the confidential character of this relation that prior to the gift Madanji did not hold the certificates.

On the other hand the two shares were not vested in Madanji before the gift to him nor can I find that he received the di-

vidends, managed the two shares, or in respect of them stood towards Mankuvarbai in a fiduciary relation.

What then is the legal result of this position? It was said by Lord Romilly in *Vaughton v. Noble* ⁽¹⁾ that “a *cestui que trust* cannot give a benefit to a trustee”; but without going that length it is clear that “persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them.” This applies to the case of trustee and *cestui que trust*: *Liles v. Terry* ⁽²⁾; see too *Wajid Khan v. Ewaz Ali Khan* ⁽³⁾.

Evidence has been adduced before Batty, J., with a view to establishing that independent advice was given, but it is his opinion after seeing the witnesses—and I agree with him—that the evidence in support of the conversations invoked in aid is far from convincing, and even if it be credited the evidence fails to show that any independent advice worthy of the name was given to Mankuvarbai.

So far then as the seven shares are concerned I am of opinion that the gift cannot prevail. But the gift of the two shares is not open to the same objection, for the mere circumstance that two persons stand to each other in the relation of trustee and *cestui que trust* does not affect any dealing between them unconnected with the subject of the trust: *Knight v. Marjoribanks* ⁽⁴⁾.

I have not overlooked the fact that it is not the donor who impugns the gift but the reversioner, who became entitled to Jivan Karsanji's estate on her death. But no reliance was placed on this in the argument, and, in my opinion, rightly so, when regard is had to the position of a reversioner who has been prejudiced by a gift attempted to be made by the widow of him whose heir he is.

Nor has it been suggested before us that it is a circumstance in favour of the gift that his sons, the first and second

(1) (1861) 30 Beav. 34 at p. 39.

(3) (1891) 18 Cal. 545.

(2) [1895] 2 Q. B. 679 at p. 686.

(4) (1849) 2 Mac. & G. 10 and 2 H. & Tw. 308.

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defendants, were associated with the trustee as donees of the trust property.

The result then is that in my opinion the appeal should be allowed as to the seven shares.

As one of the shares has been sold by Madanji his estate will be liable in respect of that. The first two defendants are willing to admit assets of their father in their hands to the extent of Rs. 2,000 and the plaintiff agrees to accept this Rs. 2,000 in satisfaction of all claims in respect of the share sold by Madanji in 1900. The plaintiff is, therefore, entitled to have the gift of the seven shares set aside.

There will also be a decree in the plaintiff's favour against the first two defendants for Rs. 2,000 and those defendants are further directed to transfer to the plaintiff the six shares remaining unsold on obtaining letters of administration in respect of the shares and the dividends thereon; the first and second defendants undertake forthwith to obtain the necessary letters of administration and the plaintiff undertakes to pay to the first and second defendants such sum as may be payable under the agreement recorded by Mr. Justice Batty on the 7th of April 1906. By consent declare that the plaintiff is entitled to the Rs. 118-12-7, the plaintiff undertaking to pay thereout Rs. 18-12-7 to the defendants.

The decree should be prefaced with a declaration that the seven shares, notwithstanding the gift, formed part of the estate of Jivan Karsanji.

The plaintiff is to get two-third of his costs of the suit and appeal from defendants 1 and 2.

There will be liberty to apply.

Attorneys for the appellant :—*Messrs. Nann, Hormasji & Co.*

Attorneys for the respondents :—*Messrs. Bicknell, Merwanji & Romer.*

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

In re CASSUMALI JAVERBHAI PIRBHAI.

1906.

June 23.

Guardians and Wards Act (VIII of 1890)—Investment by guardians of minor's property—Principles governing investment by guardians—Indian Trusts Act (II of 1882), section 20.

Guardians are in a fiduciary position and the Court should be guided by the rules embodied in the Trusts Act in sanctioning changes in the investment of a minor's property. The duty of guardians is primarily to preserve and not to add to the property of the minor.

Where it was sought to invest monies belonging to a minor in the purchase of lands deriving their income from buildings erected thereon,

Held, that the proposed investment not being one which trustees would be authorised to make, the Court must withhold its sanction.

Learoyd v. Whiteley⁽¹⁾ followed and applied.

PETITION in Chambers.

The material facts upon which the present application was made appear in the judgment.

Laverarity appeared for the petitioners the guardians of the minor Cassumali and applied for Court's sanction to the investment of monies belonging to the minor in lands deriving income from buildings erected thereon.

SCOTT, J. :—In this case the property of the minor is estimated to be of the value of upwards of 14 lacs of rupees, more than 4 lacs of which is invested in Bombay in immoveable property, 2½ lacs on mortgage of immoveable property and the balance for the most part in authorized trustee securities.

The sanction of the Court is now asked for the investment by the guardians of Rs. 6,65,000 by sale of that amount of the trustee securities and re-investment in the purchase of certain house property situate at the junction of Church Gate Street and Esplanade Road.

In the case of trustees in whom property is vested the Court could not, apart from any special investment clause in the instrument of trust, sanction a change of investment into any

⁽¹⁾ (1887) 12 App. Cas. 727 at p. 733.

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securities other than those mentioned or referred to in section 20 of the Indian Trusts Act: see section 40.

Guardians are in a fiduciary position and I think the Court should ordinarily be guided by the rules embodied in the Trusts Act in sanctioning changes in the investment of the minor's property.

The question here is whether there is anything in the circumstances of this case which should induce the Court to favour a further investment in house property which is not a trustee security.

The minor has a large income from his money, most of which is well invested already, but his guardians and their valuer say that a higher rate of interest can be obtained from the desired purchase and that the property proposed for acquisition could be still further developed. Both these results may be reasonably expected, although as pointed out by Lord Romilly in *Ingle v. Partridge*,⁽¹⁾ nothing is more uncertain than a valuation.

The property which it is desired to purchase is land deriving its value from buildings erected on it which at present are in a favourite locality for trade purposes. House property is of a wasting character and trade is not always constant in particular localities.

The following observations of Lord Watson in *Leaoyd v. Whiteley*⁽²⁾ are in point:—

"[A trustee] is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard In cases where the subject of the security derives its value from buildings erected on the land, or its use for trade purposes, the margin [demanded of a trustee advancing money on mortgage] ought not to be less than one half. I do not think these have been laid down as hard and fast limits up to which trustees will be invariably safe In cases where the subject of the security are exclusively or mainly used for the purposes of trade, no prudent investor can be in a position to judge of the amount of margin

(1) (1865) 34 Beav. p. 412.

(2) (1887) 12 App. Cas. 727 at p. 733.

necessary to make a loan for a term of years reasonably secure, until he has ascertained not only their present market price, but their intrinsic value, apart from those trading considerations which give them a speculative and it may be a temporary value."

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If the proposed change of investment were sanctioned upwards of 12 out of the minor's 14 lacs would be invested directly or indirectly in house property, the greater part of it without any margin for contingencies. I do not think there is any necessity for this. The duty of guardians is primarily to preserve, not to add to the property of the minor.

The application is therefore rejected.

Application rejected.

Attorneys for the applicant :— *Messrs. Payne & Co.*

W. L. W.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr.
Justice Beaman.*

KRISHNABAI KOM JANARDAN SUNDUR THAKUR (ORIGINAL PLAINTIFF),
APPELLANT, *v.* MANOHAR SUNDURRAO (ORIGINAL DEFENDANT),
RESPONDENT.*

1906.

July 17.

Civil Procedure Code (Act XIV of 1883), section 401—Application to file a suit in formâ pauperis—"Other than his necessary wearing apparel and the subject-matter of the suit"—Construction.

The applicant applied for leave to file a suit *in formâ pauperis* alleging that after her husband's death, her husband's brother possessed himself of her property including the ornaments that she ordinarily was accustomed to wear. She sued to recover these ornaments. The Subordinate Judge rejected her application on the ground that she must have had these ornaments which she had been accustomed to wear.

Held, that the Subordinate Judge had failed to perceive that the point he had to consider was whether the applicant at the time at which the application was made, was possessed of sufficient means to enable her to pay the fees prescribed by law for the plaint.

* Civil Application No. 36 of 1906.

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The words "other than his necessary wearing apparel and the subject-matter of the suit" in the explanation to section 401 of the Civil Procedure Code, 1882, do not qualify that part of the explanation which requires that the person should not be possessed of sufficient means to enable him to pay the fee prescribed by law, but only the condition that the applicant is not entitled to property worth Rs. 100.

THIS was an application filed under section 622 of the Civil Procedure Code (Act XIV of 1882).

The applicant, who was the widow of one Janardan Sundur, applied to file a suit *in formâ pauperis* against the defendant, who was brother of her deceased husband. She alleged that after husband's death, taking advantage of her absence from her house, the defendant removed all ornaments and valuables belonging to her from the house. She prayed to recover these ornaments, which were her *stridhan*. The applicant further stated that the value of her wearing apparel which was the only property in her possession was Rs. 10, and that she had no means to pay the required Court-fee stamp on her claim.

The Subordinate Judge held that the applicant should not be allowed to sue *in formâ pauperis* as she was not a pauper. The grounds of his judgment were as follows:—

"This much I can at present say with some degree of certainty that the applicant's story that there is nothing left with her and that she has no means to pay the stamp duty is not true. It is not probable that she had no ornaments of daily use on her person when she went to her mother's house at Yeola in the month of Kartik and after her return here. They must have been all along on her person when she left her husband's house after his death whether under compulsion or voluntarily. They must have been with her. The value of these ornaments is more than the amount required for the payment of the Court-fees."

The applicant thereupon applied to the High Court.

N. V. Gokhale, for the applicant:—The learned Subordinate Judge holds that some ornaments of daily use must be with the applicant. That is deciding a point which will be the subject of regular investigation after the application to sue as a pauper has been registered as a suit. It was not competent to the lower Court under section 401 of the Civil Procedure Code to decide at

this stage whether the applicant or the opponent was in possession of the applicant's ornaments. These very ornaments are the subject-matter of the suit and cannot be taken into consideration in the determination of the question relating to the applicant's pauperism. Otherwise the parties as well as the Courts would be placed in a very false position by an adjudication on a main point at issue between the parties in the disposal of a mere application for leave to sue as a pauper. There is really speaking no distinction between the first and the second part of the explanation appended to section 401. The wording is no doubt different. But in both the classes of suits contemplated by the explanation "the subject-matter of the suit" must be excluded from the calculation, as such property is presumably out of the petitioner's reach and cannot be made use of by him for purposes of his litigation : *Dwarkanath Narayan v. Madhavrao Vishvanath*.⁽¹⁾ On principle there is no reason why the Legislature should have laid down different conditions as to pauperism in the two classes of suits. If "the subject of the suit" is excluded from the scope of the inquiry into pauperism, all difficulties disappear and one uniform principle can be consistently applied to all cases. The English Practice is in accord with this contention. *Vide the Annual Practice, 1906, vol. 1, Rule 22 at p. 171.* Besides the lower Court has acted upon mere assumptions and surmises and has failed to ascertain the exact value of the property alleged to be in the possession of the applicant and to determine whether the applicant was possessed of sufficient means to enable her to pay the Court-fee prescribed by law : *Muhammad Husain v. Ajudhia Prasad*.⁽²⁾

B. N. Bhajekar, for the opponent :—The concluding portion of the explanation "other than his necessary wearing apparel and the subject-matter of the suit" do not govern its first part. The punctuation makes this perfectly clear. Besides if an applicant actually came into Court with some of the property in suit, the Court cannot exclude it from its consideration. He is evidently *possessed* of it and it must be taken into account in deciding the question of pauperism. The conditions of pauperism

(1) (1886) 10 Bom. 207 at pp. 209, 210.

(2) (1888) 10 All. 467.

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in the two classes of suits referred to in the explanation are different, and in the first case Courts are not precluded from considering the fact that the applicant is possessed of the whole or part of the subject-matter in suit. The lower Court has found as a fact on evidence that some ornaments are in the possession of the applicant, and that she is in a position to pay the requisite Court-fee, and therefore this Court has no jurisdiction to interfere under section 622, Civil Procedure Code.

N. V. Gokhale, in reply:—Punctuation is no part of a statute (Maxwell page 589) and cannot be allowed to stand in the way of reasonable construction of its terms. If a petitioner actually came into Court with the property in suit, on principle the same difficulty arises in dealing with the second class of suits as with the first class, *i.e.*, in excluding it from consideration in the one case and taking it into account in the other. When a wrong course of inquiry is applied that is a material irregularity and a ground for interference under section 622. *Rao Balwant Singh v. Ranikishori*.⁽¹⁾ Similarly when Courts fail to determine an essential question of fact, it is competent to this Court to interfere in revision on the ground of material irregularity. *Muhammed v. Ajudhia*⁽²⁾; *Lakhma v. Gulabchand*.⁽³⁾

JENKINS, C. J.:—This is an application to us under section 622 of the Civil Procedure Code on the ground that the applicant has been improperly denied the right she claims to sue as a pauper under Chapter XXVI of the Code of Civil Procedure.

The case made by her is that after the death of her husband his brother possessed himself of her property including the ornaments that she ordinarily was accustomed to wear, and that he still retains them and refuses to return them to her.

She applied for leave to sue as a pauper to recover, among other things, these particular ornaments, alleging that she was not possessed of sufficient means to enable her to pay the fees prescribed by law for the plaint.

The Subordinate Judge has rejected her application on the ground that she must have had, at the times mentioned in

(1) (1898) 2 Cal. W. N. 273 at p. 274. (2) (1888) 10 ALL. 467.

(3) (1888) P. J. p. 215.

his judgment, these ornaments, which she had been accustomed to wear.

Before us it is urged that the Subordinate Judge was not entitled to take those ornaments into consideration; for that even if they had been in her possession they should have been treated as excluded by the concluding words of the Explanation to section 401 of the Civil Procedure Code, "other than his necessary wearing apparel and the subject-matter of the suit."

In our opinion, however, those words do not apply here. We do not think that they qualify that part of the explanation which requires that the person should not be possessed of sufficient means to enable him to pay the fee prescribed by law, but only the condition that the applicant is not entitled to property worth Rs. 100.

In our opinion the Subordinate Judge has failed to perceive that the point he had to consider was whether the applicant at the time at which the application was made, was possessed of sufficient means to enable her to pay the fees prescribed by law for the plaint, and thus his investigation is vitiated by an irregularity in the exercise of his jurisdiction, entitling us to interfere under section 622.

Where it is sought to make out that what the plaintiff claims in the suit as being in the possession of the defendant, is really in the plaintiff's possession, the clearest evidence should be adduced.

If it be found that a part of the subject-matter of the suit is in the applicant's possession, then it should be distinctly determined how far the possession of that part can be regarded as possession of sufficient means to enable the applicant to pay the fees prescribed by law for the plaint.

The result then is that we make the rule absolute and send back the case in order that it may be determined by the Judge in the light of these remarks.

Costs will be reserved to be dealt with on the final determination of the pauper application.

Rule made absolute.

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APPELLATE CIVIL.

1906.
July 19.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Heaton.

PANDURANG. BALAJI AND OTHERS (ORIGINAL DEFENDANTS 1, 2, 8 AND 9), APPELLANTS, v. NAGU BIN DADU (ORIGINAL PLAINTIFF), RESPONDENT.*

Breach of contract—Procuring breach—Knowledge of the contract—Suit for damages.

In a suit to recover damages for procuring a breach of contract, the plaintiff must establish not merely that the defendant procured the other defendants to commit a breach of contract but that he did so knowing that there was that contract.

SECOND appeal from the decision of Vaman M. Bodas, First Class Subordinate Judge of Satara with Appellate Powers, reversing the decree of D. W. Bhat, Subordinate Judge of Tasgaum.

The plaintiff sued to recover damages, namely, Rs. 1,300, for breach of contract, alleging that for the purpose of irrigating and raising garden crops on certain land he was entitled to the use of the water of a well in land adjoining and that owing to the obstruction caused by defendants 2—10 at the instigation of defendant 1 to the use of the water his crops failed and he suffered damages. He further alleged that he had brought a suit in the Mámlatdár's Court for the removal of the defendants' obstruction, but he did not get relief and hence he brought the present suit.

Defendant 1 denied having instigated the other defendants to obstruct the plaintiff.

Defendants 2, 3, 4 and 9 denied the plaintiff's exclusive right to the water of the well. They contended that they were also entitled to use the water, that they never caused obstruction to the plaintiff and that he had not suffered any loss.

Defendant 5 admitted the plaintiff's right to enjoy the water of the well in the manner stated in the plaint but he along with defendants 6, 7, 8 and 10 answered that they did not obstruct

the plaintiff and were not liable to the claim and that it was defendant 2 who obstructed the plaintiff.

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The Subordinate Judge rejected the claim holding that the plaintiff was not entitled to take water in the manner stated in the plaint, that defendants 2—10 did not prohibit plaintiff from taking water of the well in question at the instigation of defendant 1 and that though the plaintiff's crops suffered damage owing to the insufficiency of water, defendants were not responsible for it. In his judgment the Subordinate Judge made the following observations :—

There have been inconsistencies in the statements of defendants' witnesses, but they are so slight that I am not inclined to disbelieve them. The evidence of defendants' witnesses appears to me to be more creditable than that of plaintiff's witnesses. Taking the whole of the evidence and the probabilities of the case into consideration, I find that the plaintiff was not entitled to enjoy the well water by the two western *machads* (water-wheels) to the exclusion of the other tenants; that defendants Nos. 2—10 did not prohibit plaintiff from enjoying the well water according to his turn; that they were not set up by defendant 1 to prohibit plaintiff from enjoying the well water according to his turn; that defendants were perfectly justified in telling plaintiff not to enjoy the well water by the two western *machads* each day; that on account of failure of rains there was little water in the year in question; that plaintiff suffered loss in so much as his crops did not get sufficient water; that it cannot be ascertained how much damage he suffered; and that defendant No. 1 is not liable to plaintiff's claim, as he did not instigate others to prohibit plaintiff from enjoying the well water according to his turn.

On appeal by the plaintiff the Judge found that the plaintiff's crops suffered damage by the wrongful act of defendants 2—10, that defendant 1 was liable to the claim, and that the plaintiff was entitled to recover damages. He, therefore, reversed the decree and allowed the claim to the extent of Rs. 700. With respect to the liability of defendant 1 the Judge observed :—

As for defendant 1, I find on the evidence that he, too, is liable. The lower Court itself says that the relations between him and the plaintiff were strained. When examined as a witness in the suit in Mámátdár's Court, he like defendants 2—10 denied plaintiff's right to draw water from the well except during 5½ *prahars** from all the *machads*. Witness 56, whom I believe, swears that within his own hearing he (defendant 1) asked the other defendants to

* Three hours make one *prahar*.

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obstruct plaintiff, and to use force even if necessary. There seems little doubt that without his instigation and encouragement, the other defendants would probably not have dared to upset the arrangement that was in force continuously for more than 9 years.

Defendants 1, 2, 8 and 9 preferred a second appeal.

G. K. Dandekar, for the appellants (defendants 1, 2, 8 and 9) :—The evidence adduced by the plaintiff shows that there was an agreement between plaintiff who held the land under a lease from the Jamkhindi State and defendants 2—10, who were also tenants of that State, to take the water of the well by two *machads* daily instead of taking it by all the *machads*, namely twelve, for certain hours during a week as stipulated under the original lease. He further led evidence to prove that defendants 2—10 committed breach of the agreement at the instigation of defendant 1. The Judge in appeal finds that without the instigation of defendant 1, who is the agent of the Jamkhindi State, the other defendants would not have probably dared to upset the agreement which was in force continuously for nine years. The finding of the Judge is that defendants 2—10 committed the breach at the instigation of defendant 1. But we submit that that finding is not sufficient to saddle defendant 1 with liability. He will be liable only if he instigated the breach knowing that there was the agreement between the plaintiff and defendants 2—10. The plaintiff never alleged nor was there any evidence in the case to prove knowledge of the agreement on the part of defendant 1. The exact point does not seem to have arisen in any Indian case. But there are English cases which assume knowledge of the agreement or contract as one of the essential conditions for imputing liability on account of procuring a breach : *Allen v. Flood*⁽¹⁾, *Quinn v. Leathem*⁽²⁾, *Lumley v. Gye*⁽³⁾. These cases show that the defendant brought about the breach with the knowledge of the agreement.

[JENKINS, C. J., referred to *Fores v. Wilson*⁽⁴⁾.]

B. N. Bhajekar, for the respondent (plaintiff) :—(He was called upon to point out whether there was any evidence on the record

(1) [1898] A. C. 1.

(2) [1901] A. C. 495 at pp. 510, 535.

(3) (1853) 2 E. & B. 216 at p. 224.

(4) (1791) Peake N. P. C. 55 (77).

to show that defendant 1 had knowledge of the agreement.) There is no evidence to show knowledge of the contract on the part of defendant 1, but the Judge in appeal has relied upon certain circumstances from which knowledge on the part of defendant 1 can be inferred. Those circumstances are that the relations between him and the plaintiff were strained. In the Mámlatdár's Court he denied the plaintiff's right to draw water as claimed in the plaint. One witness, who is believed by the Judge, says that he heard defendant 1 telling the other defendants to obstruct the plaintiff and to use force if necessary.

We further submit that knowledge on the part of defendant 1 is not necessary to saddle him with liability for the breach: *Wharton v. Moona Lall*⁽¹⁾.

Dandekar, in reply:—The circumstances relied on followed the breach and did not precede it. They cannot prove knowledge of the contract on the part of defendant 1.

(Cross-objections filed by the respondent were heard and disallowed.)

JENKINS, C. J.:—The plaintiff has brought this suit against ten defendants and as the case was ultimately formulated in the lower appellate Court, the complaint against defendants Nos. 2 to 10 was breach of contract and against No. 1 instigation to the breach of that contract.

The lower appellate Court granted the plaintiff relief against all the defendants.

From that decree defendants Nos. 1, 2, 8 and 9 have appealed.

In our opinion the appeal of 2, 8 and 9 fails.

The appeal, however, of No. 1 raises an interesting point.

The fact, that defendant No. 1 may have induced the rest of the defendants to adopt a course of conduct which amounted to a breach of a contract by the other defendants with the plaintiff, would not alone give the plaintiff a right of action. To entitle the plaintiff to succeed against the defendant No. 1, he must establish not merely that defendant No. 1 procured the other

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⁽¹⁾ (1866) 1 Agra 96.

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defendants to commit a breach of contract, but that he did so knowing that there was that contract.

That appears to us to be the clear result of the decision of the House of Lords in *Quinn v. Leatham*⁽¹⁾ and also of the earlier decision in *Fores v. Wilson*⁽²⁾.

Though the lower appellate Court here has held that defendant No. 1 did procure the breach by defendants 2 to 10 of their contract with the plaintiff, it is not found that he did so knowingly in the sense we have indicated.

We have hesitated for some time as to whether we would send down an issue on this point, because we thought it possible that the evidence made it clear that there must have been knowledge on the part of the defendant No. 1, but the learned pleader for the plaintiff is unable to draw our attention to any definite statement to that effect.

We therefore think the matter must be further investigated and accordingly we send down the following issue:—

Whether it was with knowledge of the contract between the plaintiff and defendants Nos. 2 to 10, that the defendant No. 1 procured a breach of that contract by defendants Nos. 2 to 10?

We think that this point probably was not present to the minds of those concerned with the case in the lower Courts; therefore, further evidence may be adduced.

The finding should be returned within three months.

We will deal with the costs of the whole appeal when it comes on again. We have heard the cross-objections and we think they must fail.

Issue sent down.

G. B. R.

(1) [1901] A. C. 495.

(2) (1791) Peake N. P. C. 55 (77).

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Heaton.*

DARVES HAJI MAHAMAD SIDIK AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS, v. JAINUDIN VALAD HAJI BADRUDIN AND OTHERS
(ORIGINAL DEFENDANTS), RESPONDENTS.*

1906.
August 13.

Civil Procedure Code (Act XIV of 1882), section 539—Suit relating to public charity—Suit filed by only one plaintiff with the consent of the Advocate General—Amendment of plaint by subsequent addition of second plaintiff—Consent of the Advocate General to the amendment—Suit defective in a material particular.

A suit relating to a public charity was instituted by one plaintiff only with the consent of the Advocate General under section 539 of the Civil Procedure Code (Act XIV of 1882). The defendant having objected to the institution of the suit by one plaintiff, the plaint was amended by the addition of the second plaintiff and the Advocate General consented to the amendment.

Held dismissing the suit in appeal that the suit was defective in a material particular. The suit was bad at its institution and its amendment by adding second plaintiff did not better it.

FIRST appeal from the decision of R. S. Tipnis, District Judge of Thána, in original Suit No. 2 of 1902.

The plaintiff sued to obtain certain reliefs with respect to the property in dispute which was *wakf*. The Advocate General had given his consent to the suit under section 539 of the Civil Procedure Code (Act XIV of 1882).

The defendants answered *inter alia* that the plaintiff alone had no right to bring the suit under section 539 of the Code.

An issue having been raised as to whether there was "any objection to plaintiff alone bringing this suit," arguments were heard on the point along with other points of law involved in the case.

In the course of the arguments the defendants contended that the suit being instituted by one plaintiff only, it did not comply with the condition laid down in section 539 of the Civil Procedure Code and was consequently not maintainable.

The plaintiff admitted the existence of the defect and applied for time to amend the plaint by joining some other interested

* First Appeal No. 133 of 1905.

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person as co-plaintiff. The time having been granted, the plaintiff and his son Gulam Mustaffa presented an application with the previous consent of the Advocate General endorsed on it for amendment of plaint and the suit as proposed in the application. The consent was in the following terms:—"I give my consent to the amendment of the plaint of this suit as proposed."

The defendants objected to the joinder of Gulam Mustaffa as plaintiff 2, but the Court overruled the objection and the suit proceeded at the instance of the two plaintiffs. On the merits of the case the Judge partially allowed the claim.

The plaintiffs appealed and the defendants filed cross-objections under section 561 of the Civil Procedure Code. One of the cross-objections was that the Judge was wrong in granting the plaintiffs' application for the amendment of the plaint.

D. M. Gupte appeared for the appellants (plaintiffs) and argued the appeal on the merits.

V. B. Pradhan appeared for the respondents (defendants):—Before entering on the merits of the case we submit that the Judge was wrong in granting the application for the amendment of the plaint. The Judge relied on sections 27 and 32 of the Civil Procedure Code. Section 27 is not applicable because in the present case there was no mistake as to the plaintiff, nor was there any doubt as to whether the suit was in the name of the real plaintiff. With respect to section 32 the Judge says that though the added plaintiff is the son of the original plaintiff, he is, in his own right, interested in the *wakf*, so his presence was necessary to adjudicate completely and effectually the matter in dispute. The conclusion of the Judge seems to be that even without the amendment the Court had jurisdiction to adjudicate the suit, but as such adjudication would not be complete and effectual the other party was joined. Our contention is that without the amendment the Court could not have proceeded with the suit at all.

[JENKINS, C. J.:—But the second paragraph of section 32 empowers the Court to join any plaintiff who ought to have been originally joined.]

The Judge has not relied on that paragraph.

[JENKINS, C. J.:—We can support the order of the Judge by relying on that paragraph.]

• Our next contention is that the amendment changed the character of the original suit. Such an amendment could not be allowed under section 53 of the Code.

Further, the consent of the Advocate General to the amendment was not such a consent as is contemplated by section 539 of the Code. That section makes the consent of the Advocate General a condition precedent to the institution of the suit: *Gopal Dei v. Kanno Dei*⁽¹⁾.

Though we took the objection under section 539 of the Code at the outset, the amendment was allowed at a later stage of the suit.

[JENKINS, C. J.:—We will hear Mr. Gupte on this part of the argument.]

Gupte:—There was, no doubt, the initial defect in the suit, but on defendant's objection the defect was sufficiently cured by the addition of another plaintiff with the consent of the Advocate General. The consent of the Advocate General would refer back to the institution of the suit: *Ramayyengar v. Krishnayyengar*⁽²⁾. The defect, we submit, was not a material defect affecting the case on the merits. Under section 32 of the Civil Procedure Code, the Court is empowered to join any person as plaintiff or defendant whose presence it considers to be necessary for proper adjudication.

JENKINS, C. J.:—This appeal arises out of a suit relating to a public charity and purporting to be brought under section 539 of the Code of Civil Procedure.

The circumstances under which such a suit can be instituted are indicated in the section: it may be instituted by the Advocate General acting *ex-officio* or by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General.

This suit was not instituted by the Advocate General, so it must be seen whether it can be said, that two or more persons

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(1) (1903) 26 All. 162.

(2) (1886) 10 Mad. 185.

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having an interest in the trust and having obtained the consent in writing of the Advocate General, instituted this suit. In our opinion it cannot.

What is meant by the institution of the suit is set forth in detail in Chapter V of the Code.

It is conceded that the institution of the suit within the meaning of Chapter V was not by two persons, but by one only; and the fact that the Advocate General consented to the institution of the suit by one person can give it no validity.

The objection was taken at once in the written statement and that led to an amendment of the plaint by the addition of the second plaintiff.

That addition the learned Judge appears to have thought he was entitled to make under section 27 or section 32 of the Civil Procedure Code, and the Advocate General signed the following certificate:—"I give my consent to the amendment of the plaint of this suit as proposed."

But the section nowhere speaks of the consent of the Advocate General to an amendment of the plaint, and in our opinion, it would be unduly forcing the words of the Code to hold that by virtue of this consent given by the Advocate General it can be said of this suit that it was instituted by two persons having an interest in the trust and having obtained the consent in writing of the Advocate General.

The words of the section are explicit and the Courts cannot alter the scheme of the Legislature by giving to the words of the section the effect for which the appellant contends in this case.

The defendants have throughout adhered to their point that the suit was bad at its institution and that its amendment did not better it; and we can find nothing in the conduct of the defendants that deprives them of the right of insisting now before us in appeal that the provisions of section 539 have not been complied with.

In our opinion the suit is one which is defective in a material particular and is one which we must dismiss with costs throughout.

Suit dismissed.

G. B. R.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Beaman.*

PARMAPPA BIN BASANGAUDA NEGLORE AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 3), APPELLANTS, v. SHIDDAPPA BIN GIRIAPPA NEGLORE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1906.
August 15.

Hindu Law—Stridhan—Succession—Full brothers of the husband are entitled to succeed in preference to his half-brothers—Mitakshara.

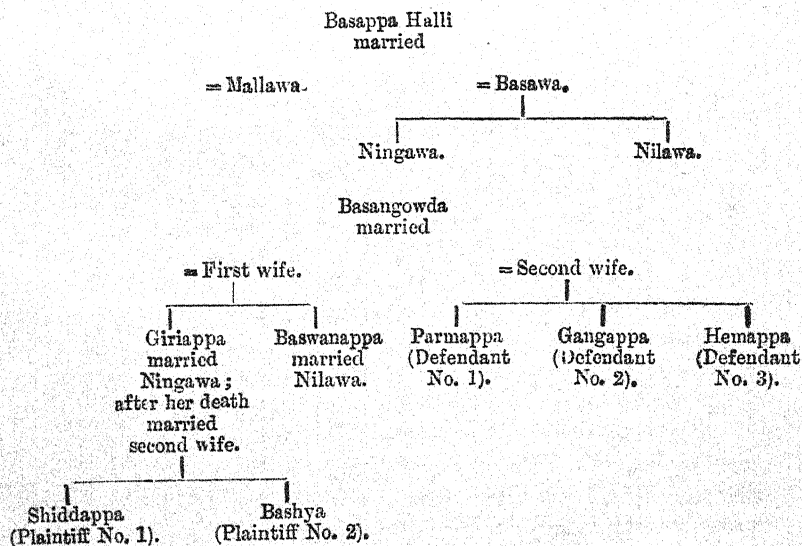
A Hindu widow died without issue leaving her surviving one whole brother and three half-brothers of her deceased husband :

Held, that under the Mitakshara by which the parties were governed, for the purpose of succession to the non-technical stridhan of a widow who has died without issue, the whole brother of her deceased husband is to be preferred to his half-brother.

SECOND appeal from the decision of V. V. Phadke, First Class Subordinate Judge at Dhárwār with A. P., reversing the decree passed by V. V. Kalyanpurkar, Subordinate Judge of Haveri.

This was a suit to recover possession of certain lands.

The following two geneological trees show the relationship of the parties concerned in this suit:—



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Basappa Halli originally owned the property in dispute. He had two wives named Mallawa and Basawa and two daughters named Ningawa and Nilawa. These daughters were married respectively to Giriappa and Basappa, who were sons by the first wife of one Basangowda. Basangowda also had a second wife, by whom he had three sons, defendants Nos. 1—3. After the death of Basappa Halli and his daughter Ningawa, Mallawa, the elder widow, transferred five pieces of land to the name of Giriappa and five to the name of Baswanappa. This was in 1881. In 1888, she sold five more lands to Giriappa, Baswanappa and defendant No. 1.

After the death of Ningawa, Giriappa married Shiddawa, by whom he had two sons, Shiddappa and Bashya (plaintiffs Nos. 1 and 2).

Mallawa died in 1891. Baswanappa died in 1893. Nilawa died in 1897, and Girappa died soon after.

Disputes then arose between plaintiffs Nos. 1 and 2 on the one hand and defendants Nos. 1, 2 and 3 on the other, as to the estate left by Nilawa.

The Subordinate Judge decided against the plaintiffs' contentions, holding that both the plaintiffs' father (who was a full brother of Nilawa's husband) and the defendants Nos. 1 to 3, who were his half-brothers, were entitled to the estate left by Nilawa.

This decree was, on appeal, reversed by the lower appellate Court, for reasons stated as under :—

"Giriappa, the father of plaintiffs, and defendants Nos. 1—3 were alive at death of Nilawa. Giriappa was her husband's full brother and defendants Nos. 1—3 were his half-brothers. The lower Court relying on the decision in *Vithalrao v. Ramrao* (I. L. R. 24 Bom. 317) has held that full brothers of the deceased husband of a widow are not to be preferred to half-brothers. That was, however, a case in which uncles were to succeed to the property of a deceased nephew and the High Court held that uncles of full blood have no right of preference over those of half blood. The present case is however a case of succession to a woman and the law provides that the heirs of the husband succeed. Hence the heirs must come in according to their ranks in the list of enumerated heirs. That was the principle followed in *Gajabai v. Shrimant Shahajirao Maloji Raje Bhosle* (I. L. R. 17 Bom. 114). I, therefore, hold that the father of the plaintiffs as the full brother of Nilawa's husband was her

only heir to the exclusion of defendants Nos. 1—3. His interest has passed to plaintiffs and they alone have become owners of the property."

The defendants appealed to the High Court.

Setalvad (with *G. S. Mulgaonkar*), for the appellants (defendants):—We submit that the succession to a woman's *stridhan* passes first to her husband, and failing him to her heirs in the family of the husband. These heirs would be plaintiffs' father as well as defendants, who were all brothers of her husband. The preference of full brothers over half-brothers is limited to the case where the property belongs to the propositus and not where the property belongs to the widow of the last male holder. See *Vithalrao v. Ramrao*⁽¹⁾ and *Gojabai v. Shrinant Shahajirao Maloji Raje Bhosle*⁽²⁾ and *Manilal Rewadat v. Bai Rewa*⁽³⁾.

Sellur (with *K. H. Kelkar*), for the respondents (plaintiffs):—We contend that the heirs to a woman's *stridhan* are the same as the heirs of the husband in his line. The cases of *Krishnai v. Shripati*⁽⁴⁾ and *Bai Kesserbai v. Huneraj Morarji*⁽⁵⁾ show that whoever is nearest to the husband is also nearest to the wife in the husband's family, and even according to the ordinary principle of propinquity a full brother is certainly nearer than a half-brother.

JENKINS, C. J.:—The principal point that arises on this appeal is whether for the purpose of succession to the non-technical *stridhan* of a widow who has died without issue the whole brother of her deceased husband is to be preferred to his half-brother.

This case comes from Dhárwár and must be determined by the rules of the Mitakshara so far as they apply.

Now it is not disputed that the deceased was married in an approved form, and where that is so the Mitakshara in Ch. II s. 11, pl. 11, as translated by Mr. Colebrooke, says "Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma,

(1) (1899) 24 Bom. 317 : 2 Bom. L. R. 139.

(2) (1892) 17 Bom. 114.

(3) (1892) 17 Bom. 758.

B 1040—5

(4) (1905) 30 Bom. 333 ; 8 Bom. L. R. 12.

(5) (1906) 30 Bom. 431 ; 8 Bom. L. R. 446 at p. 449.

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Daiva, Arsha and Prajapatya, the whole property, as before described, belongs in the first place to her husband. On failure of him it goes to his nearest kinsmen, *Sapindas* allied by funeral oblations."

It is pointed out by Mr. Justice Telang in *Gojabai v. Shrimant Shahajirao Maloji Raje Bhosle*,⁽¹⁾ that the rendering of *Sapindas* as 'kinsmen allied by funeral oblations' is not correct in this Presidency.

But if we ask who, as between his brother and his half-brother, were the nearest kinsmen of the deceased's husband, the answer is clear: the whole brothers admittedly were nearer to him than his half-brothers.

But Mr. Setalvad argues that the Mayukha treats the point in a manner which forbids our taking this view.

But we think we should be guided by Mr. Justice Telang on this point. He says "It is possible to harmonize them, if both the Mitākshara and Mayukha are understood to refer to the same heirs, only by different descriptions—the Mitākshara describing them as *Sapindas* of the husband, the Mayukha as *Sapindas* of the wife in the family of the husband." *Gojabai v. Shrimant Shahajirao Maloji Raje Bhosle*⁽²⁾.

It is therefore (in our opinion) clear that the full brother is to be preferred to the half-brother; and we hold that the lower Court came to the correct conclusion.

The only other question is as to whether Nilawa acted in such a way as that it can be said that she recognized a transfer by which Mallawa purported to pass the property to the defendants along with the plaintiffs. That is a question of fact; it has been determined adversely to the defendants; we cannot in second appeal interfere with the conclusion of the lower appellate Court.

The result therefore is that we confirm the decree with costs.

Decree confirmed.

R. R.

(1) (1892) 17 Bom. 114 at p. 117.

(2) (1892) Ibid p. 118.

CRIMINAL APPELLATE.

Before Mr. Justice Aston and Mr. Justice Beaman.

EMPEROR v. KOTHIA VALAD NAVALYA BHIL.*

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August 30

Criminal Procedure Code (Act V of 1898), sections 337, 338—Accomplice—Pardon—Grant of conditional pardon—The pardoned accomplice giving full and true story of the crime, but retracting it in cross-examination before the Sessions Court—Order of Sessions Court to Committing Magistrate to withdraw the pardon—Forfeiture of pardon—Trial of accused for the offence—Commitment—Conviction on his plea of guilty—Irregularity—Illegality—Practice and Procedure.

The accused was one of several persons accused of murder. He accepted a tender of pardon made to him by the Committing Magistrate on the conditions set out in section 337 of the Criminal Procedure Code. He was examined as a witness for the Crown before the Committing Magistrate, and he made a full and true disclosure of the whole of the circumstances within his knowledge relating to such offence. He repeated them in his examination-in-chief before the Sessions Judge, but resiled from his statements in cross-examination. At the conclusion of the trial, in which the accomplices were convicted of murder, the Sessions Judge sent the pardoned accomplice in custody to the Committing Magistrate with an order directing that he should be committed for trial for the same murder. The Magistrate accordingly withdrew the pardon and committed the accused to the Sessions Court to take his trial for the murder aforesaid. The Sessions Judge convicted the accused of murder on what was described as his plea of guilty and was sentenced to transportation for life. On appeal,

Held, by Aston, J., that the Sessions Judge had no authority under the Code of Criminal Procedure to order the accused to be committed for trial for the murder in respect of which a pardon had been tendered; and, further, that the accused's trial was conducted with material irregularity which seriously prejudiced the accused and occasioned a failure of justice.

Held, by Beaman, J., that the Sessions Judge, who presided at the first trial, had no power to make the order purporting to have been under section 339 of the Criminal Procedure Code, directing the commitment of the accused on the ground that he had forfeited his pardon; and that the procedure adopted was both wrong and illegal.

Per Aston, J.—It is open to a pardoned accomplice, if placed on trial as an accomplice who has forfeited the pardon already accepted by him, to plead in bar of trial that he did comply with the condition on which the tender of pardon was made, and such plea in bar of trial would have to be gone into and decided

* Criminal Appeal No. 268 of 1906.

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before the accused is called on to enter his plea in defence to the charge of having committed the offence in respect of which the pardon was tendered.

Section 339 of the Criminal Procedure Code does not enact that a person who has accepted a tender of pardon, renders himself liable to be tried for the offence in respect of which pardon was tendered, if he gives false evidence; what the section says is that he renders himself so liable (or forfeits the pardon) if by giving false evidence he has not complied with the condition on which the tender was made.

Per Beaman, J.:— At the termination of the trial in which the pardon was given, the accomplice must be discharged by the Court. Then if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put upon his trial for that offence, he may plead to a competent Court his pardon, in bar. And that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence. In deciding it the Court would have to raise the issues whether he had or had not complied with the conditions of the pardon, whether he had or had not made a full and true disclosure of the whole facts. And where after having admittedly done that he had at a later stage recanted, that recantation amounted to giving false evidence within the meaning of section 339 of the Criminal Procedure Code, and worked a forfeiture of the pardon.

APPEAL from conviction and sentence recorded by R. S. Tipnis, Sessions Judge of Khandesh.

The facts of the case were briefly as follows :

One Amiruddin was formerly Karbhari to the Chieftain of Gangtha (Chikli) Estate, but had left his service and was living at Bhaver near Talvada. He was murdered on the night of the 4th December 1904 and for a long time the Police were without a satisfactory clue. At last Kothia (the present accused) was induced by the promise of pardon to confess that he in company with one Godia Vanji and five others had murdered the deceased.

Kothia was accordingly offered under section 337 of the Code of Criminal Procedure (Act V of 1898) a full pardon by the Committing Magistrate, on condition of his giving a full and true account of the circumstances within his knowledge relating to the offence.

The pardoned man (Kothia) then gave what appeared to have been a true account before the Magistrate and before the Sessions Judge, but when cross-examined in the Sessions Court he stated

that the account he had given was false and he had been told by the Police to give it.

The Sessions Judge at the end of the trial, which resulted in the conviction of all the accused, passed an order under section 339 of the Code of Criminal Procedure (Act V of 1893) ordering Kothia to be tried for the murder, and sent him to the Committing Magistrate.

The Committing Magistrate revoked the pardon tendered to the accused and held proceedings for his commitment.

The accused admitted before the Committing Magistrate that he first gave a true statement and then declared it was false; but stated that he was told to do so by the pleader for the defence.

The Magistrate then charged the accused Kothia with committing an offence under section 302 of the Indian Penal Code (Act XLV of 1860) and committed him for trial to the Sessions Court.

In the Sessions Court the accused pleaded guilty of the offence of murder. The learned Sessions Judge convicted the accused on his own plea of guilty and sentenced him to suffer transportation for life. His reasons for accepting the plea of guilty were as follows :—

“The cancellation of the pardon once granted to the accused was within the authority of the Sessions Court. It cannot now be questioned, nor can the accused escape from the consequences of his crime by pleading that he forfeited that pardon in consequence of bad advice. In any case it is not an extenuation of the offence.

“Perhaps his trial for giving false evidence might have sufficed the ends of justice, more especially as I find that the record discloses that the present accused took a subordinate part in the murder, and it was through utter foolishness more than anything else that he forfeited his pardon.”

The accused appealed to the High Court against this conviction and sentence.

M. M. Karbhari (amicus curiæ) for the accused :—The procedure adopted by the Sessions Judge was illegal. He had no power to send the accused in custody to the Committing Magistrate or to detain him in custody after the termination of the trial. Section 337, clause 3, Criminal Procedure Code, provides that the

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accused who has been tendered a pardon should be detained in custody until the termination of the trial. Section 476 of the Code does not apply, because powers under that section are only to be exercised in cases of those offences enumerated in section 195 of the Code.

There is no provision in the Code which indicates what Court is competent to forfeit the pardon, under section 339. Generally the sanction of the High Court should first have been obtained under section 339, clause (3), to show that the approver has given false evidence and that the pardon should therefore stand forfeited. There are no doubt decided cases showing that the Court granting the pardon can revoke it, but the words used in section 339 are "by giving false evidence," and not, "by giving evidence which in the opinion of the Court tendering the pardon is false."

Now a pardon can only be forfeited if the approver has not complied with the conditions on which the tender of pardon was made. Mere giving false evidence is not enough. Here the accused has no doubt admitted giving false evidence in his cross-examination, but this is not enough for the purposes of sections 337 and 339. Take the case of an approver deliberately making a statement implicating himself as well as the other accused persons; and it is subsequently found that he gave false evidence in order to screen himself or some other person or persons, against the accused, then that case is covered by sections 337 and 339. Reading sections 339 and 337 together we see that if the approver by wilfully concealing anything essential or by giving false evidence does not make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence, &c., he forfeits his pardon and is liable for being tried for the principal offence. In this case the disclosure made by the accused before the Committing Magistrate and in his examination-in-chief is relied upon in the principal case and is there held to be full and true, and all that the accused is charged with doing is that he withdrew his statement in his cross-examination before the Court of Sessions. Now apart from the fact of his being guilty of giving false evidence, if the disclosure is believed to be full and true then I submit the accused does not forfeit pardon. He may be liable to be tried for giving

false evidence, but he cannot on that account be said to have forfeited his pardon and rendered himself liable to be tried for the principal offence.

The Government Pleader for the Crown :—The withdrawal of the pardon should be made under section 339, Criminal Procedure Code, by the Court that granted it: *Queen-Empress v. Manick*⁽¹⁾ and *Queen-Empress v. Ramasami*⁽²⁾. After the termination of the trial in which the present accused was an approver, the accused was sent to the Committing Magistrate who had tendered the pardon. The pardon was withdrawn by the proper authority, viz., the Magistrate who tendered it, and hence there was no bar to the trial of the present appellant.

The appellant has no doubt made a full and true disclosure, but at the same time he has given evidence in his cross-examination which he admitted to be false and hence he forfeits the pardon under section 339 of the Criminal Procedure Code.

ASTON, J.:—The appellant, a Bhil named Kothia valad Navalya, was one of the persons accused of murder in the case of *King-Emperor v. Godia and 5 others*. He accepted a tender of pardon made to him by the Committing Magistrate on the conditions set out in section 337 of the Criminal Procedure Code (Act V of 1898), and was examined as a witness for the Crown at the trial of his accomplices in the Sessions Court of Khandedsh, for an offence of murder.

At the trial he, according to the case presented by the learned Government Pleader for the Crown in the appeal now before us, made "a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, and to every other person concerned, whether as principal or abettor, in the commission thereof" and so far had fully complied with the condition on which pardon was tendered and accepted.

The Sessions Judge nevertheless, at the conclusion of the trial of the abovementioned case in which the accomplices were convicted, sent the pardoned accomplice Kothia (present appellant) in custody to the Committing Magistrate with an order directing that he should be committed for trial for the same murder.

(1) (1897) 24 Cal. 492.

(2) (1900) 24 Mad. 321.

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This order, which purports to have been made under section 339 of the Code of Criminal Procedure, was made because this pardoned accomplice after fulfilling the statutory conditions on which the tender of pardon was made and accepted, had on a later date, and in cross-examination, resiled from his statement made in examination-in-chief having, as this Bhil approver alleged, been meanwhile suborned by a Nandurbar Pleader.

The result of this order is that after the further step was taken of getting the pardon "withdrawn" by the Magistrate who had tendered it, this approver was committed to the Sessions Court to take his trial for the murder aforesaid and was convicted of murder on what is described as his plea of guilty and has been sentenced to transportation for life.

Against this conviction and sentence he appeals to this Court and his main ground of appeal is that faith has not been kept with him, because although it is true that he did under evil influence give false evidence when cross-examined, he had in fact already fulfilled the conditions on which he had accepted the tender of pardon.

Under section 337, Criminal Procedure Code, a conditionally pardoned accomplice if not on bail shall be detained in custody until the termination of the trial, and in the present appeal the authority of the Sessions Judge to order at the close of the trial such approver to be discharged from custody, has not been questioned. It is, I think, open to argument whether if a Sessions Judge is of opinion that the pardon has become forfeited, he has not also authority to order a conditionally pardoned accomplice to be remanded in custody until the proper authority has had reasonable time to decide whether further proceedings are to be taken against him from the stage where his prosecution was interrupted by the tender of pardon. But the learned Government Pleader has not attempted to justify the Sessions Judge Mr. Gidumal's order directing the prosecution of the present appellant, an order purporting to be made under section 339 but for which that section gives no authority.

It has however been contended that as the pardon was "withdrawn" by the proper authority, namely, the Magistrate

who tendered it, there was no bar to the trial of the present appellant, and the cases *Queen-Empress v. Manick Ohandra Sarkar* ⁽¹⁾ and *Queen-Empress v. Ramasami* ⁽²⁾ were cited in support of this contention.

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But there is no provision in any of the sections of the Code for cancelling, or revoking, or withdrawing a pardon. Section 339 of the earlier Code Act X of 1882 as amended by Act V of 1898 no longer contains the word *withdrawn*. It contemplates a pardon being *forfeited* under that section, but neither in this section nor in any other part of the Code is it enacted that the forfeiture of a pardon depends upon the opinion of the Judge or Magistrate trying a case in which the conditionally pardoned accomplice has agreed to make a full and true disclosure.

It is therefore open to a pardoned accomplice, if placed on trial as an accomplice who has *forfeited* the pardon already accepted by him, to plead in bar of trial that he did comply with the condition on which the tender of pardon was made, and such plea in bar of trial would have to be gone into and decided before the accused is called on to enter his plea in defence to the charge of having committed the offence in respect of which the pardon was tendered.

The Sessions Judge (Mr. Tipnis), who convicted the appellant, was therefore doubly wrong in ruling (1) that "the cancellation of the pardon once granted to the accused was within the authority of the Sessions Court" and (2) that "it cannot now be questioned".

The record shows that the position of the appellant was not explained to him as to this, before he was called upon to make his plea in defence and was convicted of the murder in respect of which a pardon had been tendered conditionally.

The first paragraph of section 339, Criminal Procedure Code, runs as follows:—"Where a pardon has been tendered under section 337 or section 338, and any person who has accepted such tender, has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on

(1) (1897) 24 Cal. 492.

(2) (1900) 24 Mad. 321.

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which the tender was made, he may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter."

It will be seen that this section does not enact, that a person who has accepted a tender of pardon renders himself liable to be tried for the offence in respect of which pardon was tendered, if he gives false evidence. What the section says is that he renders himself so liable (or forfeits the pardon) if by giving false evidence he has not complied with the condition on which the tender was made.

That condition is the condition set out in section 337 and the learned Government Pleader has very fairly conceded that this condition had been complied with before the appellant gave the evidence which he admitted was false.

The appellant is a Bhil and the Sessions Judge before recording his plea as a plea of guilty should in a case like the present one have been careful to ascertain whether he meant to admit that he had not complied with the condition on which the tender of pardon was made.

It was not disputed at the hearing that the appellant did comply fully with the statutory condition before he gave false evidence and it appears to me that the appellant in his plea at trial did not intend to admit anything to the contrary.

It appears for the reasons already stated that the Sessions Judge had no authority under the Code to order the present appellant to be committed for trial for the murder in respect of which a pardon had been tendered, and further this appellant's trial was conducted with material irregularity which seriously prejudiced the accused and has occasioned a failure of justice.

It is not necessary to decide in this appeal whether the pardon was in the above circumstances forfeited, it is sufficient to say that the question whether the pardon was in fact forfeited should have been inquired into and decided at the trial of appellant before he was called upon to plead to the charge of murder.

We set aside the conviction and sentence and direct that appellant be discharged.

Our acknowledgments are due to Mr. Karbhari who argued the case as *amicus curiæ* for the appellant.

There is no indication in the record whether investigation has been made into the charge made by the appellant against a Nandurbar pleader of suborning evidence.

BEAMAN, J.:—We are much indebted to Mr. Karbhari who argued this appeal as *amicus curiæ*. The questions arising upon sections 337, 339, Criminal Procedure Code, as to the proper mode of procedure when an accomplice to whom pardon has been tendered has in the opinion of the authorities forfeited the pardon, are, in the present state of the law, of some complexity and importance. The reported decisions, to which reference is commonly made in cases of the kind, do not tend to throw much light on the subject. Doubtless what is discussed and has been the occasion of some differences of opinion in most of them, is due to the wording of the law as it stood before it was amended by the present Act. Thus the proposition for which there is plenty of authority in the case law that the proper person to withdraw a pardon is the person who tendered it—a proposition which is, I think, answerable for a good deal of confusion of thought, might have once been appropriate for controversy, but hardly is so now. Apart from the fact that the existing law makes no mention of withdrawing or cancelling a pardon at all, the proposition is in itself disputable. For to take a simple case, can it be seriously contended that where a Magistrate of the first class has tendered a pardon, and where the accomplice has given evidence in the Sessions Court which the presiding Judge believes to be full and true, it is open, notwithstanding that belief, to the Magistrate who did not hear the evidence given to form his own opinion and thereupon to withdraw the pardon and put the accomplice on his trial for the principal offence? One difference between the Madras and the Bombay High Courts pivots upon a point with which I am not now directly concerned. And a great deal of judicial interpretation has been stripped of authority and rendered obsolete by the change of language in

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the Statute. We have not now to consider what the law was but what it is. And the law contains no provision whatever for any one withdrawing, revoking or cancelling a pardon. It does not go beyond defining the manner in which a pardon once tendered and accepted may be forfeited. Sections 337-338 lay down the conditions upon which and the officers by whom a pardon may be tendered. Then if the accomplice accepts the conditions and the pardon is given, the law goes on to say that his evidence shall be taken and that he shall be kept in custody until the termination of the case. If the case ends in the Sessions Court, the Sessions Judge will be bound to detain him till it is finished ; no longer : and so if the case ends in the High Court, that Court will have to detain him till it is finished. But no authority is given to any one to detain him an hour longer. It is not for the Judges of the Sessions or the High Court to exercise a discretion in the matter, and to say that they will detain him in order that further proceedings may be taken against him, much less, of course, to direct that such proceedings be instituted. Last, the law states how the pardon may be forfeited. Comparing these provisions, we shall see that a pardon is offered upon two main conditions, first that the accomplice shall make full, second a true disclosure of all he knows about the crime. And the pardon is forfeited by his failure to comply with these two conditions in two corresponding ways, first by concealing some material fact, that is to say, by not making a full, or by giving false evidence, that is, by not making a true disclosure. And I think that the words "false evidence" must be read subject to the limitations of their context, as defining one of the modes of non-compliance with the conditions of the pardon, and not in their fullest literal sense. It is plain that the latter could not have been meant. For no one would maintain that a man who had been pardoned for making a full and true disclosure of a murder, and had done so, and a month afterwards had given false evidence in an assault case, had thereby forfeited his pardon and rendered himself liable to be tried for the murder. Looking at the section in that way it appears to me open to very real doubt whether the appellant had forfeited his pardon. Most assuredly it was a

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question to be enquired into in a proper way and not to have been disposed of as it was in the Sessions Court which tried and sentenced him. This being the law, what is to be done where a person to whom pardon has been given, has in the opinion of the Crown forfeited it? Brushing aside all the confusion arising from the decisions of Courts on this and allied subjects, and keeping a single eye upon what the law says, the answer seems to be plain. At the termination of the trial in which the pardon was given, the accomplice must be discharged by the Court. Then if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put upon his trial for that offence, he may plead to a competent Court his pardon, in bar. And that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence. In deciding it the Court would have to raise the issues whether he had or had not complied with the conditions of the pardon; whether he had or had not made a full and a true disclosure of the whole facts. And where, as in the present case, after having admittedly done that, he had at a later stage recanted, whether that recantation amounted to giving false evidence within the meaning of section 339 and worked a forfeiture of the pardon? Such questions, it seems to me plain, would have to be enquired into and answered at the trial and in the presence of the prisoner; they are not to be settled by an *ex parte* opinion of this or that officer, in the form of a sanction or a direction to the police or to any other subordinate Court to proceed as though no pardon had been given and accepted. Had this procedure been followed it may very well be doubted whether the appellant would ever have been put on his trial for the murder at all; or whether if he had, the Sessions Court would have held that his pardon had been forfeited. But the procedure that was adopted has shut him out of all possibility of these advantages. The Sessions Judge who presided over the first trial, made an order purporting to have been under section 339 directing the commitment of the appellant on the ground that he had forfeited his pardon. Now it is perfectly plain that the Judge had no power to make any such order. In form it is an

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order under section 476; but that section limits the Judge's power to offences of a special kind, among which it is hardly necessary to say murder is not included. By making such an order professedly under section 339 the Sessions Judge prejudged the question whether the appellant had really forfeited his pardon. And this could after all be only, as far as he was concerned, a matter of opinion. He believed that the accomplice had given false evidence within the meaning of section 339; but the Court which had to try him for the murder might have thought otherwise. If the Sessions Judge had formed that opinion not upon a mere contradiction, but, as is often the case, on the general nature of the testimony given, it is clear that when the pardon was pleaded in bar, he would have been liable to be called as a witness to state the grounds of his opinion and if necessary to be cross-examined upon them. But the Court which tried the prisoner when he was re-arrested and sent up on the strength of this order, held that it was concluded by the order from going into any question of the kind. This shows how seriously the appellant was prejudiced by the procedure (a procedure which in my opinion was wrong and illegal) that was adopted. The appellant did admittedly make a full and true disclosure of the whole facts, and it was only at a later stage that he was suborned, as he says, in a weak moment to recant. Considering that his evidence was used and relied upon, and seems to have been the main ground upon which the prisoners in the first trial were convicted, it may well be doubted whether the Crown would have regarded the late and superfluous retraction of that evidence, as constituting a forfeiture of the pardon, but for the unauthorized command of the Judge. As to that however we do not feel called upon to express any opinion now, nor upon the further question whether should the Crown be advised to proceed further against the appellant a competent Court would hold upon all the facts that the pardon had been forfeited. It is sufficient to say that we think that the prisoner has been so seriously prejudiced by the procedure followed, that we ought to set aside the conviction and sentence, leaving it to the Crown, if so advised, to institute a prosecution in proper form against the accused appellant.

R. R.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Beaman.*

1906.

September 5.

SAKHARAM BHASKAR (ORIGINAL DEFENDANT 2), APPELLANT, v.
PADMAKAR MAHADEO (ORIGINAL PLAINTIFF), RESPONDENT.*

*Civil Procedure Code (Act XIV of 1882), section 80—Appeal—Respondent—
Service of notice—Failure to carry out the requirements of the Code (Act
XIV of 1882).*

A bailiff, who was deputed to serve notice of an appeal on the respondent, affixed a copy of the notice on the outer door of the respondent's house under section 80 of the Civil Procedure Code (Act XIV of 1882), and reported as follows:—"The respondent was not found; his adult undivided son having refused to receive copy of the notice, it was affixed to the front door of his house."

Held that the service of the notice was not proper. The report was merely a statement that the respondent could not be found and the serving officer was not shown to have carried out the requirements of the Civil Procedure Code (Act XIV of 1882).

Rajendro Nath Sanyal v. Jan Meah⁽¹⁾ and *Sakina v. Gauri Sahai*⁽²⁾ referred to.

APPEAL against an order of remand passed by H. S. Phadnis, Assistant Judge of Ratnágiri, reversing the decree of M. I. Kadri, Subordinate Judge of Chiplún, and sending back the case for trial on the merits.

This action was instituted by the plaintiff to recover from the defendants forty-seven rupees as his share in the value of certain trees cut by them.

The defendants contended that the suit was bad for misjoinder of parties and that the plaintiff's remedy lay in a suit for partition.

The Subordinate Judge dismissed the suit holding that it was multifarious and also being one for the recovery of damages was not maintainable.

On appeal by the plaintiff the Judge found that the plaintiff was entitled to partial relief as against defendant 2. He, there-

* Appeal No. 13 of 1906 from order.

(1) (1898) 26 Cal. 101.

(2) (1902) 24 All. 302.

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fore, reversed the decree only with respect to that defendant and remanded the suit for trial on the merits after framing certain issues.

Defendant 2 appealed against the said order of remand.

H. C. Coyaji appeared for the appellant.

The appeal was admitted and notice of the appeal was ordered to be issued to the respondent (plaintiff). The bailiff of the Subordinate Judge's Court, who was deputed to serve the notice of the appeal on the respondent, affixed it on the outer door of the respondent's house and made a report, No. 1302, dated the 31st May 1906, as follows :—

The respondent was not found; his adult undivided son having refused to receive the copy of the notice, it was affixed to the front door of his house.

A question having arisen whether the said service was proper the Court gave the following ruling.

JENKINS, C. J. :—The report of the bailiff verified by his affidavit does not satisfy us that the serving officer was entitled to affix a copy of the summons on the outer door of the house in which the respondent ordinarily resided, as provided by section 80 of the Civil Procedure Code.

There is merely a statement that the respondent could not be found. But it does not appear that any effort was made to find him, or that even enquiry was made of his son, who was found, as to where the respondent was.

The serving officer is not shown to have carried out the requirements of the Civil Procedure Code and we must therefore send down the notice for proper service. In this connection we refer to *Rajendro Nath Sanyal v. Jan Meah*⁽¹⁾ and *Sakina v. Gauri Sahai*⁽²⁾.

Order accordingly.

G. B. R.

(1) (1898) 26 Cal. 101.

(2) (1902) 24 All. 302.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Beaman.*

1906.
September 11.

RAMAPPA BIN DAREPPA AND ANOTHER, APPLICANTS, v.
BHARMA BIN RAMA, OPPONENT.*

Civil Procedure Code (Act XIV of 1882), sections 551, 623—Decree passed by first Court allowing plaintiff's claim—Appeal by defendant—Summary dismissal of appeal—Application by defendant to the first Court for review—Jurisdiction.

Plaintiff having obtained a decree in the first Court, the defendant appealed but his appeal was summarily dismissed under section 551 of the Civil Procedure Code (Act XIV of 1882). Subsequently the defendant applied to the first Court for review of judgment under section 623 of the Code on the ground of discovery of new and important evidence.

Held, that as the defendant had preferred an appeal and it was dismissed under section 551 of the Code, his application to the first Court for review of judgment could not be entertained.

It is open to the person aggrieved, after an appeal has been preferred, to apply for a review, provided his appeal is withdrawn. As by the cancellation of the order for admission of an appeal it is to be taken that no appeal was admitted, so by withdrawal of the appeal it must be treated as though no appeal was preferred. But when an appeal is actually dismissed, it was in fact preferred and cannot be regarded as not having been preferred.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against an order of H. V. Chinmulgund, Second Class Subordinate Judge of Chikodi in the Belgaum District, rejecting an application for review of judgment.

The plaintiff brought a suit for partition and for the recovery of his one-third share in the family property from defendants 1 and 2 who, he alleged, were his father and brother respectively.

The defendants disputed the plaintiff's legitimacy and contended that as the plaintiff was born some time after defendant 1 began to live separate from plaintiff's mother owing to her misconduct, he was not entitled to demand a share.

* Application No. 145 of 1903 under extraordinary jurisdiction.

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The first Court found in favour of the plaintiff's legitimacy under section 112 of the Indian Evidence Act (I of 1872) and allowed the claim. The defendants appealed, but their appeal was summarily dismissed under section 551 of the Civil Procedure Code (Act XIV of 1882). The defendants, thereupon, presented an application to the first Court for review of its judgment under section 623 of the Code on the ground of the discovery of new and important evidence, but that Court rejected the application for reasons stated below :—

This is an application for a review of judgment. From the copies of the judgments produced in this case it is evident there was an appeal which was dismissed under section 551, Civil Procedure Code. Mr. Karagupikar quotes 21 Bom. 548 and argues that dismissal of an appeal under section 551 leaves the decree of the original Court untouched and that a review can be granted. But that case does not apply to this. In it there was the question of bringing the decree in conformity with the judgment under section 206, Civil Procedure Code, while in this the applicant wants to get a review on the ground of discovery of new evidence and for such a matter the ruling in 21 Bom. 548 does not apply.

The wording of section 623, clause (a), Civil Procedure Code, is clear. No review can be sought if an appeal has been preferred. The wording does not admit of a construction on the result of the appeal. If an appeal has been preferred no review is allowed.

I therefore reject this application with costs under section 54, clause (c), and section 623, clause (a), Civil Procedure Code.

The defendants preferred an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) urging that the lower Court failed to exercise a jurisdiction vested in it by law by refusing to admit the review applied for, that it acted with material irregularity in rejecting the application for review under sections 54, clause (c) and 623 (a) of the Code, that it should have held that the dismissal of an appeal under section 551 of the Code was a refusal to entertain it as in the case of an appeal dismissed as time-barred and the decree of the lower Court remains as such untouched and that it ought to have held that the mere fact of an appeal having been preferred did not deprive it of the jurisdiction to review its judgment and it is only the pendency of an appeal that operates as a bar. A *rule nisi* having been issued requiring the opponent (plaintiff) to show cause why the order of the lower Court refusing to grant a review should not be set aside,

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S. S. Patkar appeared for the applicants (defendants) in support of the rule:—The question is whether in case an appeal against a decree is summarily dismissed under section 551 of the Civil Procedure Code, an application for review of judgment should be made to the appellate Court or to the Court which passed the original decree. We presented an application for review to the Court which passed the original decree, but that Court rejected our application under sections 623 (a) and 54 (c) of the Civil Procedure Code. The effect of the dismissal of an appeal under section 551 is stated in *Bapu v. Vajir*⁽¹⁾. There it is laid down that the dismissal of an appeal is the refusal to entertain it as in the case of an appeal dismissed as time-barred. This decision was arrived at on two grounds, namely, (1) that the language of section 551 was changed in 1883 to emphasize the difference between the results of a dismissal under section 551 and confirmation under section 577 and (2) that when an appeal is dismissed under section 551, it is the decree appealed against that remains to be executed. The term "preferred" in section 623 seems to militate against our contention, but this High Court allows an application for review to be filed in the lower Court even after an appeal is preferred to the High Court. The current of decisions running from *Nanabhai Vallabhdas v. Nathabhai Haribhai*⁽²⁾ to *Pandu v. Devji*⁽³⁾ supports our contention. The authorities show that where there is an appeal there may be review of judgment of the Court against whose decree the appeal is preferred and allowed to be withdrawn. In *Pandu v. Devji*⁽³⁾ it was laid down that if the Full Bench in *Nanabhai Vallabhdas* was justified in holding that the result of a special (second) appeal being allowed to be withdrawn was to treat it as never being admitted, it is not going further to say that by the same process an appeal may be treated as having never been preferred. In *Pandu v. Devji*⁽³⁾ it has been held, relying on the last paragraph of section 623 of the Code of 1877 which is the same as in the present Code, that it is the pendency of the appeal and nothing else which comes in the way of the application for review. We applied for review on the ground of discovery of new and

⁽¹⁾ (1896) 21 Bom. 548 at 551.⁽²⁾ (1872) 9 Bom. H. C. R. 89.⁽³⁾ (1883) 7 Bom. 287.

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important evidence. It was, therefore, proper to apply to the Court which dealt with the evidence adduced at the hearing of the suit. We did not apply for review of the order dismissing the appeal under section 551 of the Code. Besides the final decree capable of execution is the decree of the first Court and not that of the Court in appeal, therefore the first Court had jurisdiction to entertain the application for review.

S. R. Bakhle appeared for the opponent (plaintiff) to show cause:—An appeal having been preferred against the decree of the first Court, there cannot be any application for review to that Court. The power of review is given under section 623 of the Civil Procedure Code and the section is quite explicit on the point. When an appeal is dismissed under section 551 of the Code, the appellate Court has to draw up a decree and such decree can be attacked by preferring a second appeal. The applicants should, therefore, have applied for review of the appellate Court's decree: *Shivlal Kalidas v. Jumalal Nathiji Desai*⁽¹⁾.

JENKINS, C. J.:—This is an application to the High Court under section 622 of the Code of Civil Procedure.

The petitioners' complaint is that the lower Court has wrongly rejected an application made by them for a review of judgment under section 623 of the Code of Civil Procedure.

The ground on which the lower Court rejected that application was that an appeal had been preferred.

To this it is answered that the appeal was dismissed under section 551.

It appears to us that it was none the less preferred on that account. Indeed it was only because it was preferred that it was dismissed.

Then Mr. Patkar has contended that the line of decisions commencing with *Nanabhai Vallabhdas v. Nathubhai Haribhai*⁽²⁾ and ending with *Pandu v. Devji*⁽³⁾ assists him.

Those cases decide that, where there has been an appeal, there still may be a review of the judgment of the Court against whose

(1) (1893) 18 Bom 542.

(2) (1872) 9 Bom. H. C. R. 89.

(3) (1893) 7 Bom. 287.

decree the appeal was preferred, provided the appeal to the higher Court is withdrawn.

Nanabhai v. Nathabhai⁽¹⁾ was a decision under Act VIII of 1859. By section 376 of that Act it was provided that any person, considering himself aggrieved by a decree of a Court of original jurisdiction, from which no appeal shall have been preferred to a superior Court, or by a decree of a District Court in appeal from which no special appeal shall have been admitted by the Sudder Court, may, under the circumstances there indicated, apply for a review of judgment by the Court which passed the decree.

A request was made to admit a review of judgment passed in special appeal on the ground that new evidence had been discovered since the special appeal had been decided.

That matter was referred to a Full Bench, and in course of his judgment Sir Michael Westropp after indicating that the proper course was to permit the appellant to withdraw his appeal, and thus to treat it as never having been admitted, says that "on granting the permission to withdraw the special appeal, the Court might direct that the order, by which the special appeal had been admitted, should be cancelled."

In the same volume of the Bombay High Court Report (*i.e.*, 9 Bom. H. C. R.), at page 238, is the case of *Narayan v. Davudbhai*⁽²⁾, before Sir Charles Sargent and Mr. Justice Melvill; after referring to the decision in *Nanabhai v. Nathabhai*, and in particular to the passage which we have quoted they say: "It appears to us that the proper course is that indicated in the words above quoted"; and then they go on to say, "If the order for admission be annulled, it is as if the order had never been made."

Then we come to the decision in *Pandu v. Derji*⁽³⁾ when Act X of 1877 was the Civil Procedure Code then in force. Its language resembles that of the present Code, for, by section 623 of that Act, it is provided that "any person considering himself aggrieved by a decree or order, but from which no appeal has been preferred, may apply for a review of judgment."

It is to be noticed that the language has been altered. There are no longer the words "from which no special appeal shall

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(1) (1872) 9 Bom. H. C. R. 80.

(2) (1872) 9 Bom. H. C. R. 238.

(3) (1883) 7 Bom. 287.

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have been *admitted*," but there are the words "in which no appeal shall have been *preferred*." There is undoubtedly a considerable difference between the two phrases: an admission of an appeal is an act of the Court, the preferring of an appeal is the act of the party. Yet the learned Judges in *Pandu v. Devji*⁽¹⁾ held that notwithstanding this change of language it was still open to a person aggrieved, after a special appeal had been preferred to the High Court, to apply for a review provided that his appeal to the High Court was withdrawn. After referring to *Nanabhai v. Nathabhai*⁽²⁾ the learned Judges say "it is not going further to say that by the same process an appeal may be treated as having never been preferred." It is obvious, therefore, that the learned Judges considered that it was important to establish that either in fact or in fiction no appeal had been preferred, and their reasoning is that as by the cancellation of the order for admission it was to be taken that no appeal had been admitted, so by a withdrawal of the appeal it must be treated as though no appeal had been preferred.

But if we accept, as we are bound to accept, this process of reasoning which has now become part of the established practice of the Court, can we say, when the Court has actually dismissed the appeal, that the appeal has not been preferred?

We can see no legitimate mode of reasoning by which we can come to that result.

The appeal in fact was preferred, and in our opinion nothing has happened to justify us in saying that it can now be regarded as not having been preferred.

Therefore, we are of opinion that there was no error, within the meaning of section 622, committed by the Judge of the lower Court and we must, therefore, discharge this rule with costs.

Rule discharged.

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(1) (1883) 7 Bom. 287.

(2) (1872) 9 Bom. H. C. R. 80.

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BOMBAY MUNICIPAL ACT (BOM. ACT III of 1888), SEC. 3, CLS. (w), (x) AND (y), SEC. 461—*Building bye-laws Nos. 40, 42—Street—Construction.*] The owner of a large plot of ground abutting on a highway divided the plot into 19 small plots and sold them to different purchasers. These plots were mapped out as abutting on the sides of two parallel roads which were marked out as proposed roads. Each of the purchasers of the plots entered into a covenant with the owner to keep open that portion of the proposed road which stood in front of his plot and to prepare so much of the road. The question arose whether the proposed road was a street within the meaning of the City of Bombay Municipal Act (Bom. Act III of 1888):

Held, that the proposed road would constitute a street within the meaning of the City of Bombay Municipal Act (Bombay Act III of 1888).

MUNICIPAL COMMISSIONER OF BOMBAY v. MATHURABAI ... (1906) 30 Bom. 558

SEC. 249—*Place of public resort—Theatre.*] A theatre is a place of public resort and as such falls within the purview of section 249 of the City of Bombay Municipal Act (Bom. Act III of 1888).

EMPEROR v. DWARKADAS (1906) 30 Bom. 392

SECS. 410, 24, SCH. D.
(4)—*Prohibition of sale of fish except in a market—Sale from a basket placed on the Chowpatti foreshore—Sale from a vessel—Private market—Onus of proof—City of Bombay, limits of—Bombay General Clauses Act (Bom. Act I of 1904), sec. 3 (10).*] The accused, a fisherwoman, was charged under section 410 (1) of the Bombay City Municipal Act (Bom. Act III of 1888) with selling or exposing for sale, without a license from the Municipal Commissioner, fish intended for human food, on the Chowpatti foreshore, in the City of Bombay. The sale was from a basket, which the accused had placed on the sand, at some distance from the water, between the high and low water mark. The fish sold was fresh fish and was brought from one of the boats then in Back Bay. The Presidency Magistrate acquitted the accused on the grounds that (1) the Bombay City Municipal Act did not apply as the place of sale was outside the limits of the City of Bombay as laid down in the City of Bombay Municipal Act; (2) section 410 of the Act had no application because the place was a private market established from time immemorial; and (3) the sale fell within section 410 (2) of the Act. On appeal, against this order of acquittal, by the Government of Bombay:

Held, reversing the order of acquittal and convicting the accused, that the accused was not protected by section 410 (2) of the Bombay City Municipal Act (Bom. Act III of 1888), since it was impossible in the present case to say that the fish had been sold from a vessel, when as a matter of fact it had been sold from the basket on the shore, it having been brought from the vessel which was in the water.

Held, also, that the onus of proving that the place in question was a "private market" lay upon the accused.

Held, further, that the Bombay City Municipal Act (Bom. Act III of 1888) applied to the spot in question, because it came within the expression "City of Bombay" as defined by the Bombay General Clauses Act (Bom. Act I of 1904).

EMPEROR v. BUDHOGBAI ... (1905) 30 Bom. 126

BOMBAY PREVENTION OF GAMBLING ACT (BOM. ACT IV OF 1887),

SEC. 12—*Gambling in a railway carriage—Through special train—Public place—Railway track—Public having no right of access except passengers.*

See GAMBLING ... 318

BOND—*Guardians and Wards Act (VIII of 1890), secs. 34, 35, 36 and 37—Minor—Guardian—Administration bond passed to Judge—Refusal of the Judge to assign—Appeal.*] No appeal lies from an order passed by the District Judge under section 35 of the Guardians and Wards Act (VIII of 1890) declining to assign the bond.

A bond under section 34 of the Guardians and Wards Act (VIII of 1890) is to be given to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties as may be prescribed, engaging duly to account for what the guardian may receive in respect of the property of the ward. There is nothing in the section or in the form, as given in the schedule of the High Court Circular Orders, which suggests that the bond ceases to operate either on the death of the guardian or of the ward or on the cesser or otherwise of the guardianship, so that a right of suit would still continue notwithstanding the happening of these events.

The District Judge can in his discretion under such circumstances assign such a bond to a proper person.

GANPAT v. ANNA ... (1905) 30 Bom. 164

BREACH OF CONTRACT—*Procuring breach—Knowledge of the contract—Suit for damages.*] In a suit to recover damages for procuring a breach of contract, the plaintiff must establish not merely that the defendant procured the other defendants to commit a breach of contract but that he did so knowing that there was that contract.

PANDURANG v. NAGU ... (1906) 30 Bom. 598

TRUST—*Criminal Procedure Code (Act V of 1898), secs. 222, 239—Joinder of charges—Joint trial—Same transaction—Transaction, meaning of.*

See CRIMINAL PROCEDURE CODE ... 49

BURDEN OF PROOF—*Devasthan Committee—Powers of appointment and dismissal of Moktesars—Powers exercisable in the interests of the Devasthan—Dismissal of Moktesar—Good and sufficient cause.*

See DEVASTHAN COMMITTEE ... 508

Law of Native State—Law in British India—Difference—Trustee—Confidential relation—Gift.

See GIFT ... 578

CANTONMENT PROPERTY—*Grant—Notice of resumption—Offer of compensation—Condition precedent—Notice to one of three executors—Joint occupants.*] A certain plot known as No. 1, Queen's Gardens, situate within the limits of the Poona Cantonment, was in the year 1862 granted by the Commander-in-Chief of

the Bombay Army to one Edalji Nasarvanji Colabavala under the terms of a General Order, dated the 31st July 1856. The 14th clause of the said General Order was in these terms :—

“Permission to occupy such ground in a military cantonment confers no proprietary right, it continues the property of the State.

“It is resumable at the pleasure of Government, but

“In all practicable cases one month’s notice of resumption will be given, and

“The value of the buildings which may have been erected thereon, as estimated by committee, will be paid to the owner.”

After the grant the grantee erected a bungalow on the plot and in the year 1874 sold the bungalow and all his interest in the land to Hari Ravji Chiplunkar, who died in the year 1896 leaving a will under which he appointed defendants 1—3 as executors.

On the 19th October 1903 the Military authorities gave to defendant 1 a notice requiring him to deliver possession of the land to the Cantonment Magistrate on the 1st December following. The notice further stated that Government was prepared to pay defendant 1 Rs. 15,500 as compensation for all the buildings standing on the land, or if the defendant disputed the said amount, then such amount as may be determined by a Committee of Arbitration, and that on defendant’s failure to comply with the terms of the notice a suit in ejectment would be filed. The defendants having failed to comply with the notice, the Secretary of State for India in Council brought the present suit in the year 1904 to recover possession of the land, claiming that “there is a right of resumption which is presently exercisable.”

Defendants 1—3 denied the right and contended that the notice of resumption was not proper, and that the plaintiff had no right to resume, the value of the buildings being not estimated by a committee.

Defendant 4, who was a lessee of defendants 1—3, expressed his willingness to abide by the orders of the Court as to giving up possession.

The Judge having dismissed the suit on the ground that the notice to give up possession was not proper and was not given to the proper parties, the plaintiff appealed.

Held, reversing the decree, that the General Order stated in terms as clear as possible that no proprietary right was conferred by reason of a permission to occupy the ground which alone was granted, and that the ground continued the property of the State and was resumable at the pleasure of Government.

Held, further, that the notice of resumption was not a condition precedent to the right of resumption. Even assuming that notice was a condition precedent, that provision had been satisfied by giving notice to one of the three executors who were joint occupants. The provision as to notice was nothing more than a statement of what will be done, when practicable, for the purpose of saving the occupant from such inconvenience as an immediate resumption might involve.

Held, further, that though the value of the buildings erected had not been estimated by a committee, it was not a condition precedent to resumption, though, no doubt, the right to that payment would arise on resumption.

Secretary of State v. Jagan Prasad, (1884) 6 All. 148, distinguished.

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See RES JUDICATA 220

SECS. 17 AND 20—*Suit against several defendants—Some defendants residing outside the jurisdiction of Court—Objection—Earliest opportunity—Acquiescence in the institution of the suit.*

Plaintiff filed a suit against three defendants in the Court at Sirsi. Defendant 1 lived within the jurisdiction of that Court and defendants 2 and 3 lived within the jurisdiction of the Court at Birsī. Plaintiff did not apply under section 17 of the Civil Procedure Code (Act XIV of 1882) for leave to sue defendants 2 and 3; on the other hand, these defendants, though they had taken an objection in their written statement that the Court had no jurisdiction, did not apply under section 20 of the Code.

The Sirsi Court allowed the claim against defendants 2 and 3 who did not reside within its jurisdiction.

On appeal by defendant 3 the District Judge set aside the decree on the ground of want of jurisdiction and ordered that the plaint be returned for presentation to the proper Court.

The plaintiff having appealed against the said order,

Held, reversing the order, that defendants 2 and 3 not having made any application under section 20 of the Civil Procedure Code (Act XIV of 1882), they must be deemed to have acquiesced in the institution of the suit and the suit could not now be said to have been improperly instituted against them in the Sirsi Court.

RANAPPA v. GANPAT

(1905) 30 Bom. 81

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 17, CL. (c) — *One of the defendants not residing within the jurisdiction of the Court—Leave given after institution of the suit.*] Where one out of three defendants did not reside within the jurisdiction of the Court and leave to sue was given after the institution of the suit,

Held, that under section 17 clause (c) of the Civil Procedure Code (Act XIV of 1882), it was not necessary that the leave of the Court must have been first given. The leave, though subsequent, was good.

NARAYAN v. SECRETARY OF STATE ... (1906) 30 Bom. 570

SEC. 43—*Mortgage—Two mortgages on the same property executed by the same person—Suit under the second mortgage for sale of the property subject to the first mortgage.*

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SEC. 80—*Appeal—Respondent—Service of notice—Failure to carry out the requirements of the Code (Act XIV of 1882).*] A bailiff, who was deputed to serve notice of an appeal on the respondent, affixed a copy of the notice on the outer door of the respondent's house under section 80 of the Civil Procedure Code (Act XIV of 1882), and reported as follows:—"The respondent was not found; his adult undivided son having refused to receive copy of the notice, it was affixed to the front door of his house."

Held, that the service of the notice was not proper. The report was merely a statement that the respondent could not be found and the serving officer was not shown to have carried out the requirements of the Civil Procedure Code (Act XIV of 1882).

Ragendra Nath Sangal v. Jan Meah, (1898) 26 Cal. 101, and *Sakina v. Gauri Sahai*, (1902) 24 All. 302, referred to.

SAKHARAM v. PADMAKAR ... (1906) 30 Bom. 623

SECS. 111, 146, 561, 566—*Suit for relief inconsistent with order—Set-off claimed in written statement—Omission to frame issue—Company—Liquidation—Indian Companies Act (FI of 1882), secs. 149, 214—Meaning of "Legally recoverable".*] *Held*, that it was essential to the right decision of the suit, that appropriate issues should be framed and tried with a view to determining the validity of Lakshmishanker's claim to set off the Rs. 57,930.

On issues having been framed and sent down for trial, the lower Court found that Lakshmishanker had lent the moneys referred to in his written statement and held that he was entitled to set off the same as against the sum of Rs. 41,891-2-0 for which the appellate Court had held him liable. The plaintiff appealed.

Held, that section 111 of the Civil Procedure Code applied and that the amount due to Lakshmishanker must be set off against the plaintiff Company's demand.

Ince Hall Rolling Mills Company v. Douglas Forge Company, (1882) 8 Q. B. D. 179, and *Ex parte Pelly* (1882) 21 Ch. D. 492, distinguished.

Per JENKINS, C. J.:—In my opinion the words "legally recoverable" in section 111 of the Civil Procedure Code, 1882, have no reference to the ability of the debtor to pay the demand in full; and a sum is legally recoverable though in the result the creditor must be satisfied with a dividend.

AHMEDABAD ADVANCE SPINNING AND WEAVING Co. v. LAKSHMISHANKER ... (1905) 30 Bom. 173

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 123—*Advocate General*
 —*Affidavit of documents by order of the Prothonotary against Advocate General*
 —*Power of the Court—Prerogative of the Crown—Practice—High Court Rule 80a.*

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SEC. 198—*Judgment to be pronounced in open Court or on some future day—Notice to the parties or their pleaders or recognized agents—Practice in the Mofussil Courts strongly disapproved of.* Section 198 of the Civil Procedure Code (Act XIV of 1882) provides that "the Court, after evidence has been duly taken and the parties have been duly heard either in person or by their respective pleaders or recognized agents, shall pronounce judgment in open Court either at once or on some future day, of which due notice shall be given to the parties or their pleaders."

Failure to observe the provisions of section 198 of the Civil Procedure Code (Act XIV of 1882), and the not uncommon practice in the Mofussil Courts to omit to pronounce judgment in open Court, strongly disapproved of.

BAI DAHI v. HARGOVANDAS ... (1901) 30 Bom. 455

SEC. 199—*Suit against a Magistrate to recover damages—Judgment written by a Judge after his transfer.* An objection having been raised to the legality of a judgment on the ground that the Judge wrote it after he had been transferred,

Held, that section 199 of the Civil Procedure Code (Act XIV of 1882) furnished a complete answer.

GIRJASHANKAR V. GOPALJI ... (1905) 30 Bom. 211

SEC. 253—*Decree against Surety—Execution against Surety—Practice and Procedure.* The provisions of section 253 of the Civil Procedure Code (Act XIV of 1882) do not permit the execution of a decree against the surety, who has become liable for the performance of the decree passed prior to his entering into the obligation.

Venkapa Naik v. Basalingappa, (1887) 12 Bom. 411, explained.

LAKSHMAN V. GOPAL ... (1906) 30 Bom. 506

SECS. 276 AND 305—*Execution of decree—Attachment—Private sale pending attachment—Suit by vendee for recovery of possession.* A judgment-debtor having executed a sale-deed of his house pending attachment in execution of a decree and the vendee having subsequently brought a suit to recover possession of the house, the lower Court dismissed the suit holding that section 305 of the Civil Procedure Code (Act XIV of 1882) furnished an answer to the suit.

Held, reversing the decree, that the sale was a private alienation and it operated to convey to the plaintiff the interest of the vendor in the property the deed purported to pass. But to prevent frauds on decree-holders, it is provided by section 276 of the Civil Procedure Code (Act XIV of 1882) that "when an attachment has been made by actual seizure or by written order duly intimated and made known in the manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise.....during the continuance of the attachment, shall be void as against all claims enforceable under the attachment." The sale, if made during the continuance of the attachment, would be void to the extent indicated in the section.

Section 305 of the Civil Procedure Code (Act XIV of 1882) is an enabling section and qualifies the prohibition contained in section 276; but on compliance with the conditions of that section a private alienation, notwithstanding section 276, becomes absolute even against all claims enforceable under the attachment.

If it did not become absolute under section 305, then it would not be operative against claims enforceable under the attachment, but to that extent would be defeasible.

SHIVLINGAPPA v. CHANBASAPPA ... (1905) 30 Bom. 337
CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 310A, CH. XIX—*Attachment—Private sale—Application to set aside sale—Sale under attachment.*
Section 310A of the Civil Procedure Code (Act XIV of 1882) is applicable to a purchaser subsequent to attachment and prior to sale under the attachment.

Where there has been a subsequent sale following on the attachment, a person answering this description is one whose immoveable property has been sold under Chapter XIX of the Code.

MULCHAND v. GOVIND... (1906) 30 Bom. 575

SEC. 331, CHAP. XIX, DIV. H—*Decree for possession—Execution of decree—Obstruction—Application for removal of obstruction numbered and registered as suit—Adverse possession—Limitation.*
On the 1st June 1889 defendant's husband Vishnu sold certain land to Vithal and passed to him a rent-note the period of which expired on the 20th March 1890. Subsequent to the expiry of the period, Vishnu, and after his death his widow, the defendant, continued in possession. Afterwards the plaintiffs, to whom the land had been sold, having obtained a decree for possession against the sons of Vishnu, Vishnu's widow, Kashibai, caused obstruction to delivery of possession in execution of the decree. The plaintiffs, thereupon, on the 22nd January 1902, applied for the removal of the obstruction and the Court, on the 26th July 1902, ordered that their application be numbered and registered as a suit between the decree-holders as plaintiffs and the claimant as defendant under section 331 of the Civil Procedure Code (Act XIV of 1882), chap. XIX, div. H.

Held, reversing the decree of the lower appellate Court, that the suit was not time-barred. The claimant was not entitled as against the decree-holders to count the time up to the 26th of July 1902, when the application was numbered as a suit, as the period of his adverse possession; for it had ended prior to the 20th March 1890, by reason of the proceedings under div. H of chap. XIX of the Code of Civil Procedure, initiated on the 22nd of January 1902.

KRISHNAJI v. KASHIBAI ... (1906) 30 Bom. 115

SEC. 372—*Receiver—Suit in ejectment by Receiver—Discharge of Receiver before termination of suit—Devolution of interest—Practice.*

See RECEIVER ... 250

SEC. 401—*Application to file a suit in formâ pauperis—"Other than his necessary wearing apparel and the subject-matter of the suit"—Construction.*

The applicant applied for leave to file a suit *in formâ pauperis* alleging that after her husband's death, her husband's brother possessed himself of her property including the ornaments that she ordinarily was accustomed to wear. She sued to recover these ornaments. The Subordinate Judge rejected her application on the ground that she must have had these ornaments which she had been accustomed to wear.

Held, that the Subordinate Judge had failed to perceive that the point he had to consider was whether the applicant at the time at which the application was made, was possessed of sufficient means to enable her to pay the fees prescribed by law for the plaint.

The words "other than his necessary wearing apparel and the subject-matter of the suit" in the explanation to section 401 of the Civil Procedure Code, 1882, do not qualify that part of the explanation which requires that the person should

not be possessed of sufficient means to enable him to pay the fee prescribed by law, but only the condition that the applicant is not entitled to property worth Rs. 100.

KRISHNABAI v. MANOHAR ...

... (1906) 30 Bom. 593

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 539—*Suit relating to public charity—Suit filed by only one plaintiff with the consent of the Advocate General—Amendment of plaint by subsequent addition of second plaintiff—Consent of the Advocate General to the amendment—Suit defective in a material particular.*

A suit relating to a public charity was instituted by one plaintiff only with the consent of the Advocate General under section 539 of the Civil Procedure Code (Act XIV of 1882). The defendant having objected to the institution of the suit by one plaintiff, the plaint was amended by the addition of the second plaintiff and the Advocate General consented to the amendment.

Held, dismissing the suit in appeal, that the suit was defective in a material particular. The suit was bad at its institution and its amendment by adding second plaintiff did not better it.

DARVES HAJI MAHAMAD v. JAINUDIN ...

... (1906) 30 Bom. 603

SECS. 551, 623—*Decree passed by first Court allowing plaintiff's claim—Appeal by defendant—Summary dismissal of appeal—Application by defendant to the first Court for review—Jurisdiction.*

Plaintiff having obtained a decree in the first Court, the defendant appealed but his appeal was summarily dismissed under section 551 of the Civil Procedure Code (Act XIV of 1882). Subsequently the defendant applied to the first Court for review of judgment under section 623 of the Code on the ground of discovery of new and important evidence.

Held, that as the defendant had preferred an appeal and it was dismissed under section 551 of the Code, his application to the first Court for review of judgment could not be entertained.

It is open to the person aggrieved, after an appeal has been preferred, to apply for a review, provided his appeal is withdrawn. As by the cancellation of the order for admission of an appeal it is to be taken that no appeal was admitted, so by withdrawal of the appeal it must be treated as though no appeal was preferred. But when an appeal is actually dismissed, it was in fact preferred and cannot be regarded as not having been preferred.

RAMAPPA v. BHARMA ...

... (1906) 30 Bom. 625

SEC. 617, CH. 46—*Reference—Reasonable doubt—Point clearly decided by the rulings of the High Court of Presidency.* A reference under chapter 46 of the Civil Procedure Code (Act XIV of 1882) can only be made when the Judge of the Court entertains a reasonable doubt.

A Judge cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court of his Presidency unless the authority of the decision can be questioned by virtue of anything said or decided in the Privy Council.

BHANAJI v. DE BRITO ...

... (1905) 30 Bom. 226

SECS. 623, 626—*Order in execution—Decree—Review—Order rejecting application for review—Appeal.* An order in execution, being a decree under the Civil Procedure Code (Act XIV of 1882), was passed on the 20th November 1902 and a supplementary order as to costs was made on the 20th December following. On the 3rd August 1903 the party aggrieved by the latter order applied under section 623 of the Civil Proce-

cedure Code for a review of judgment. Notice was issued to the opposite party and the application for review was heard with the result that the Judge after disposing of certain technical objections proceeded to deal with the case on the merits, and having done so, he rejected the application for review with costs on the 14th September 1903. Against the said order the applicant having appealed,

Held that the order rejecting the application for review was not appealable. The proper procedure would be to appeal from the order of the 20th December 1902 relating to costs.

A petition of review involves three stages of procedure. The first stage commences ordinarily with an *ex parte* application under section 623 of the Civil Procedure Code. The Court may then either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or rejected and the hearing of the rule may involve to some extent an investigation into the merits. If the rule is discharged then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached. The case is re-heard on the merits and may result in a repetition of the former decree or some variation of it. Though in one aspect the result is the same whether the rule be discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for in the latter case, the whole matter having been re-opened, there is a fresh decree. In the former case the parties are relegated to, and still rest, on the old decree.

VADILAL v. FULCHAND	...	...	...	(1905) 30 Bom. 56
COMPANIES ACT (VI OF 1882), SECS. 149, 214— <i>Liquidation—Set off claimed in written statement—Omission to frame issue—Civil Procedure Code (Act XIV of 1882), secs. 111, 146, 561, 566—Ex parte order—Practice.</i>				
See PRACTICE	...	...	...	173
COMPETENT COURT— <i>Gujarāt Tālukdārs' Act (Bom. Act VI of 1888), secs. 10, 11, 16 and 17—Tālukdārī Settlement Officer—Decision—Appeal—Second Appeal—Subsequent suit in a Court of competent jurisdiction—Res judicata.</i>				
See RES JUDICATA	...	...	...	220
COMPROMISE— <i>Compromise by parties without knowledge of solicitor—Solicitor's right to oppose motion—Costs—Solicitor's lien for costs—Summary jurisdiction of Court over suitors.</i>				
See COSTS	...	...	...	27
CONFIDENTIAL RELATION— <i>Trustee—Cestui que trust—Gift.] Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the Court that the person by whom the benefits have been conferred had competent and independent advice in conferring them. This applies to the case of the trustee and cestue que trust.</i>				
<i>Vaughten v. Noble</i> (1861) 30 Beav. 34 at p. 39 and <i>Liles v. Terry</i> [1895] 2 Q. B. 679 at p. 686, followed.				
RAGHUNATH v. VARJIVANDAS	...	...	...	(1906) 30 Bom. 578
CONSENT DECREE— <i>Res judicata—Civil Procedure Code (Act XIV of 1882), sec. 13—Fraud—Defence—Limitation.</i>				
See RES JUDICATA	395
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CONSTRUCTION OF WILL—Rule against perpetuity—Indian Succession Act (X of 1865), sec. 101		477
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See WILL

CONTRACT—Construction—Custom of trade in Bombay—Vendor and purchaser—Principal and agent—Goods ordered nett free godown—No remuneration fixed—Variance between printed and written terms—Liability to account.] The plaintiffs sued to recover the balance due to them for goods delivered by them to the defendant under certain indents, the first clause of the printed portion of which ran as follows :—"We ^{we} _I hereby request and authorize you to order, and, if possible, buy and send ^{us} _{me} the undermentioned goods on ^{our} _{my} account and risk and ^{we} _I bind ^{ourselves} _{myself} to pay for the same at the prices and conditions specified below." Other printed clauses provided that goods were to be landed by the defendant, who was to pay the import duty; the plaintiffs were not to be liable for damages though they might have advised the defendant of having placed the order, or any portion of it; the liability of the sellers and buyers, respectively, was to be the same as though a separate contract had been made out and signed in respect of each instalment; insurance was to be effected in Europe and the plaintiffs were to be free of all responsibility regarding it; the plaintiffs were not to be bound by any clauses or customs not specifically mentioned in the indent; and anything written on the indent form by the buyers in any language, other than English, except their signature, was to be null and void.

To this indent form the following matter, *inter alia*, was added in writing :—"12 Cases Ea/contg. 18 Pcs. of 25/30 yds. Plain Velvet 1421/18 at 1s. 9d. per yard. Nett free godown including duty. 60 days. 6 per cent. Int. after due date."

The plaintiffs brought out the goods referred to in the indents and the defendant took delivery of a portion of the same, but refused to take delivery of the remainder. The defendant contended, by way of defence and counter-claim, that the plaintiffs were his commission agents for the purpose of purchasing goods in the European markets, and that they were bound to furnish an account of the difference, if any, between the cost price of the goods and the price mentioned in the indents.

The lower Court, by an interlocutory judgment, held that the relation between the parties was that of principal and agent, and ordered the plaintiffs to furnish an account. The plaintiffs appealed. On appeal the preliminary objection was taken that the lower Court had erred in excluding evidence as to the custom of trade in Bombay.

By an order dated the 7th March 1904 the suit was referred back to the lower Court in order that such evidence might be taken.

On further hearing, after such evidence was taken—

Held, that there was an inconsistency between the printed and the written provisions of the indent. The print, however, could not be discarded, but it was necessary to discover the real contract of the parties from the printed as well as from the written words."

Gumm v. Tyrie (1884) 33 L. J. (Q. B.) 97 at p. 111, followed.

Held, also, that according to the custom of trade in Bombay, when a merchant requests or authorizes a firm to order and to buy and send goods to him from Europe, at a fixed price, nett free godown, including duty, or free Bombay harbour, and no rate of remuneration is specifically mentioned, the firm is not

bound to account for the price at which the goods were sold to the firm by the manufacturer. And it does not make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant.

PAUL BEIER v. CHOTALAL ... (1904) 30 Bom. 1

CONTRACT—*Pakki Adat*—Incidents of the custom—Employment for reward.] The plaintiffs in Bombay bought and sold in Bombay cotton and other products on the orders of the defendant who traded at Shahada in Khândesh. In respect of the transactions sued on the plaintiffs before due date had entered into cross contracts of purchase with the merchants to whom they had originally sold goods on the defendant's account. The transactions were entered into on *pakki adat* terms.

The contract of a *pakka adatia* in the circumstances of this case is one whereby he undertakes or guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted or differences paid: in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference.

The evidence in the case establishes the following propositions in connection with *pakki adat* dealings:—

1. That the *pakka adatia* has no authority to pledge the credit of the up-country constituent to the Bombay merchant and that no contractual privity is established between the up-country constituent and the Bombay merchant.

2. That the up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross contracts with the Bombay merchant either on his own account or on account of another constituent, and thereby for practical purposes cancel the same.

3. The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent.

Held, that the defendant knew of the custom, which was not unreasonable as it did not involve a conflict between the *pakka adatia's* interest and duty.

BHAGWANDAS v. KANJI ... (1905) 30 Bom. 205

CONTRACT ACT (IX OF 1872), SEC. 30—Wagering contracts—Agreement to pay differences—Surrounding circumstances—Form of contract not of moment—Bombay Act III of 1865.] The law which is contained in section 30 of the Contract Act (IX of 1872) and in Bombay Act III of 1865, is that the Court must not only consider the terms in which the parties have chosen to embody their agreement, but must look to the whole nature of the transaction or institution, whatever it may be, and must probe among all the surrounding circumstances, including the conduct of the parties, with a view to ascertain what in truth was the real intention or understanding between the parties to the bargain. The actual form of the contract is of little moment, for gamblers cannot be allowed to force the jurisdiction of the Courts by the expedient of inserting provisions which might in certain events become operative to compel the passing of property though neither party anticipated such a contingency.

The Court should be astute to discover what in fact was the common intention of both parties, and should do all that is possible to see through the ostensible and apparent transaction into the underlying reality of the bargain.

MOTILAL v. GOVINDRAM ... (1905) 30 Bom. 83

SECS. 46—49, 91—Commission agent—Place of payment of debt—Cause of action—Jurisdiction—Letters Patent, cl. 12.] *Held*, that where no specific contract exists as to the place where the payment of the

debt is to be made, it is clear, it is the duty of the debtor to make the payment where the creditor is. *

MOTILAL v. SUBAJMAL ... (1904) 30 Bom. 167

CONVEYANCE—*Written document—Mortgage—Contemporaneous oral agreement, or statement of intention—Inference from circumstances—Indian Evidence Act (I of 1872), sec. 92.*

See EVIDENCE ACT ... 119

COSTS—*Solicitor's lien for costs—Summary jurisdiction of Court over suitors—Compromise by parties without knowledge of solicitor—Solicitor's right to oppose motion—Negotiable security—Transfer of negotiable security by debtor to his creditor—Effect.]* By a private compromise between Cullianji, the plaintiff in the first suit, and Lakshmibai, the 6th defendant, who was also the plaintiff in the second suit, it was agreed that the plaintiff should give to Lakshmibai certain immoveable property and Rs. 15,853 in full settlement of her claim and a further sum of Rs. 500 for her solicitor's costs.

On the 21st February 1904, possession of the immoveable property was given and a sum of Rs. 500 paid to Lakshmibai. Cullianji also gave to her 3 hundis for Rs. 5,000, Rs. 5,000 and Rs. 5,853, respectively, but the hundis were dishonoured on their due dates.

In March and April 1904, the plaintiff paid 2 sums of Rs. 5,000 to Lakshmibai by cheque, in lieu of the 2 hundis for Rs. 5,000.

On the 4th June 1904, Lakshmibai's solicitor gave notice to the plaintiff, that he had a lien for costs on the sum of Rs. 15,853 agreed to be paid by the plaintiff to his client.

On the 22nd of June 1904, the plaintiff paid the sum of Rs. 5,853 to Lakshmibai, in cash, in respect of the hundi for Rs. 5,853, which was dishonoured.

The plaintiff, thereupon, moved for an order, authorizing the delivery to him of certain property, alleging that he had settled and satisfied the claims of Lakshmibai. Lakshmibai's solicitor opposed the motion on the ground that the settlement and satisfaction were collusive transactions intended to cheat him out of his costs and asked the Court to order the plaintiff to deposit the sum of Rs. 9,000 as security for the same.

Held, that in the absence of fraud or collusion between the parties, the solicitor was entitled to be paid his taxed costs, by the plaintiff, up to Rs. 5,853, being the amount paid by the plaintiff after notice of the lien.

The High Court of Bombay has a summary jurisdiction over its suitors for the purpose of enforcing a solicitor's lien for costs: and in enforcing it the Court must be guided by the principles of English law.

Whether the solicitor moves the Court by an application of his own or appears to oppose a motion of the party against whom the lien for costs is alleged to arise, in either case he calls in aid the equitable interference of the Court under its summary jurisdiction.

Devkabal v. Jefferson, Bhaishankar and Dinsha (1886) 10 Bom. 248, and *Khetter Kristo Mitter v. Kally Prosunno Ghose* (1898) 23 Cal. 887, followed. *Ramdoyal Serowgie v. Ramdeo* (1899) 27 Cal. 269, dissented from.

Held, also, that the giving of a negotiable security by the plaintiff to Lakshmibai operated as a conditional payment only and not as a satisfaction of the debt.

In re Romer and Haslam [1893] 2 Q. B. 286 at p. 296, followed.

CULLIANJI v. BAGHOWJI ... (1904) 30 Bom. 27

COURT SALE—*Civil Procedure Code (Act XIV of 1882), Chap. XIX, sec. 310A—Attachment—Private sale—Application to set aside sale—Sale under attachment.*

See CIVIL PROCEDURE CODE ... 575

CO-WIDOWS—*Deceased co-widow—Stridhan property of the deceased—Surviving co-widow entitled to succeed—Nearest surviving Sapinda of the husband—Mitakshara.*

See MITAKSHARA ... 333

—Hindu Law—*Inheritance—Law of Bombay School—Mitakshara—Vyavahara Mayukha—Succession to Stridhan—Husband's brother—Husband's brother's son—Deed of gift, construction of—Absolute or limited estate of inheritance—Vyavahara Mayukha, ch. IV, sec. 10, placita 28 and 30, construction of.*

See HINDU LAW ... 431

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECS. 222, 239—*Successive breaches of trust—Joinder of charges—Joint trial—Same transaction—'Transaction' meaning of.]* Where the accused persons were jointly in charge of trust funds, so that one could not act without the connivance of the other, and each of them misappropriated sums of money from the trust funds to his own use, thus evidently carrying through their object in concert, the fact that they carried out their scheme by successive acts done at intervals, alternately taking the benefits, did not prevent the unity of the project from constituting the series of acts one transaction, i.e., the carrying through of the same object which both had from the first act to the last : and there was no objection to their being tried jointly at one trial.

Section 222 of the Criminal Procedure Code (Act V of 1898) clearly admits of the trial of any number of acts of breach of trust committed within the year as amounting only to one offence. The section does not require any particular formulation of the accusation, but only enacts that it is sufficient to show the aggregate offence without specifying the details. It dispenses with the necessity of amplification : it does not prohibit enumeration of the particular items in the charge.

Section 239 of the Criminal Procedure Code (Act V of 1898) admits of the joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction, within the meaning of section 239. It is not necessary that the charge should contain the statement as to the transaction being one and the same. It is the tenour of the accusation and not the wording of the charge that must be considered as the test.

In section 239 of the Code, a series of acts separated by intervals of time are not excluded, provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal, this suffices to justify the joint trial, even if incidentally, one of those jointly tried has done an act for which the other may not be responsible.

The foundation for the procedure in section 239 is the association of two persons concurring from start to finish to attain the same end. No doubt if it were attempted to associate in the trial a person who had no connection whatever with the transaction at a time when one or more of the series of the acts alleged had been done then that would be outside the provisions of the section.

"Transaction" means "carrying through" and suggests not necessarily proximity in time—so much as continuity of action and purpose.

EMPEROR v. DATTO ... (1905) 30 Bom. 49

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 292—*Act X of 1882, secs. 289, 292—Adducing evidence—Documents put in during cross-examination by the accused of witnesses for the Crown—Right of reply.* During the cross-examination of a witness for the Crown certain documents were put in evidence by Counsel for the accused which were not part of the record sent up to the Court by the Committing Magistrate. No witnesses were called for the defence. The Crown claimed the right of reply.

Held, that as the documents put in during the cross-examination of a witness for the Crown were tendered and relied upon by the defence as distinct from the evidence actually tendered by the prosecution and submitted for cross-examination, they must be regarded as evidence adduced by the accused, and that therefore the Crown had the right of reply.

EMPEROR v. BHASKAR ... (1906) 30 Bom. 421

SECS. 337, 338—*Accomplice—Pardon—Grant of conditional pardon—The pardoned accomplice giving full and true story of the crime, but retracting it in cross-examination before the Sessions Court—Order of Sessions Court to Committing Magistrate to withdraw the pardon—Forfeiture of pardon—Trial of accused for the offence—Commitment—Conviction on his plea of guilty—Irregularity—Illegality—Practice and Procedure.*

The accused was one of several persons accused of murder. He accepted a tender of pardon made to him by the Committing Magistrate on the conditions set out in section 337 of the Criminal Procedure Code. He was examined as a witness for the Crown before the Committing Magistrate, and he made a full and true disclosure of the whole of the circumstances within his knowledge relating to such offence. He repeated them in his examination-in-chief before the Sessions Judge, but resiled from his statements in cross-examination. At the conclusion of the trial, in which the accomplices were convicted of murder, the Sessions Judge sent the pardoned accomplice in custody to the Committing Magistrate with an order directing that he should be committed for trial for the same murder. The Magistrate accordingly withdrew the pardon and committed the accused to the Sessions Court to take his trial for the murder aforesaid. The Sessions Judge convicted the accused of murder on what was described as his plea of guilty and was sentenced to transportation for life. On appeal,

Held, by Aston, J., that the Sessions Judge had no authority under the Code of Criminal Procedure to order the accused to be committed for trial for the murder in respect of which a pardon had been tendered; and, further, that the accused's trial was conducted with material irregularity which seriously prejudiced the accused and occasioned a failure of justice.

Held, by Beaman, J., that the Sessions Judge, who presided at the first trial, had no power to make the order purporting to have been under section 339 of the Criminal Procedure Code, directing the commitment of the accused on the ground that he had forfeited his pardon; and that the procedure adopted was both wrong and illegal.

Per ASTON, J.—It is open to a pardoned accomplice, if placed on trial as an accomplice who has forfeited the pardon already accepted by him, to plead in bar of trial that he did comply with the condition on which the tender of pardon was made, and such plea in bar of trial would have to be gone into and decided before the accused is called on to enter his plea in defence to the charge of having committed the offence in respect of which the pardon was tendered.

Section 339 of the Criminal Procedure Code does not enact that a person who has accepted a tender of pardon, renders himself liable to be tried for the offence in respect of which pardon was tendered, if he gives false evidence; what the

section says is that he renders himself so liable (or forfeits the pardon) if by giving false evidence he has not complied with the condition on which the tender was made.

Per BEAMAN, J.—At the termination of the trial in which the pardon was given, the accomplice must be discharged by the Court. Then if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put upon his trial for that offence, he may plead to a competent Court his pardon, in bar. And that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence. In deciding it the Court would have to raise the issues whether he had or had not complied with the conditions of the pardon, whether he had or had not made a full and true disclosure of the whole facts. And where after having admittedly done that he had at a later stage recanted, that recantation amounted to giving false evidence within the meaning of section 339 of the Criminal Procedure Code, and worked a forfeiture of the pardon.

EMPEROR *v.* KOTHIA ... (1906) 30 Bom. 611

CUSTOM OF TRADE IN BOMBAY—*Contract—Construction—Vendor and purchaser—Principal and agent—Goods ordered nett free godown—No remuneration fixed—Variance between printed and written terms—Liability to account.*

See CONTRACT ... 1

CUSTOM, INCIDENTS OF—*Contract—Pakki Adat—Employment for reward.*

See CONTRACT ... 205

CUTCHI MEMONS—*Succession—Marriage in approved form—Hindu Law.*] In the absence of proof of any special custom of succession, the Hindu Law of inheritance applies to Cutchi Memons.

The legal consequences of the classes of marriage, the approved and disapproved, in relation to inheritance, vary according as their leading characteristics are blameworthy or not, and suggest the inference that it is the quality and not the form of marriage that decides the course of devolution: where the marriage is approved the husband and his side come in, where disapproved, they do not.

Ashabai v. Haji Tyeb Haji Rahimtulla (1882) 9 Bom. 115, followed. *In the goods of Mulbai; Kurim Khatau v. Parthkan Munji* (1866) 2 Bom. H. C. R. 273 and the case of the *Khojaks and Memon Cutchees* (1847) 2 Morley's Dig. 431, referred to.

MOOSA HAJI JOONAS *v.* HAJI ABDUL RAHIM ... (1905) 30 Bom. 197

DAMAGES—*Suit against a Magistrate to recover damages—Judgment written by a Judge after his transfer—Civil Procedure Code (Act XIV of 1882), sec. 199—Proceedings before a Magistrate for arrears of Municipal revenue—Jurisdiction—Protection afforded to judicial officers—Public policy—Judicial officers on tour—Judicial Officers' Protection Act (XVIII of 1850).*

See JUDICIAL OFFICERS' PROTECTION ACT ... 241

—*Suit for damages for malicious prosecution—Commencement of prosecution bonâ fide—Continuance malo animo—Reasonable and probable cause—Question of fact.*] The plaintiff was a member of a joint Hindu family to which a house in Jambusar belonged. The tax in respect of this house fell into arrears. Summary proceedings before a Magistrate were instituted by the Municipality under the District Municipal Act. The amount was paid after the institution of the proceedings and the prosecution ended without a decision on the merits. The plaintiff brought this suit for damages for malicious prosecution against 5 defendants, namely (1) the Municipality of Jambusar, (2) and (3) the members of its Managing Committee, (4) its Secretary, and (5) its *Daroga*. The first Court dismissed the suit. The lower appellate Court passed a decree against defendants 1,

4 and 5 and awarded Rs. 55 as damages against them. On appeal to the High Court—

Held, that the suit should have been dismissed as against these defendants also, that the object of the Municipal Secretary being “to teach a minatory lesson to other defaulters on the disadvantages of non-payment of the tax”, that could not be regarded as an indirect motive or as malice for the purposes of such a suit, it being a legitimate end of punishment to deter other evil-doers from offending in the same way.

Query:—Whether in such circumstances the Municipality could in any case be held liable for the malice imputed to its Secretary.

Held, further, that the Secretary was no party to the proceedings which were instituted by or on behalf of the Municipality. It was not in his power to determine whether proceedings should be instituted nor did he institute them in fact.

Held: as to the *Daroga* that the facts failed to establish a sufficient ground for legal liability. Though a suit will lie for malicious continuation of proceedings, it was not shown that the *Daroga* took any active step after the payment or that he persevered *malo animo* in the prosecution or that he had the intention of procuring *per nefas* the conviction of the accused.

Fitzjohn v. Mackinder (1861) 30 L. J. (C. P.) 257 at p. 264, followed.

TOWN MUNICIPALITY OF JAMBUSAR *v.* GIRJASHANKER ... (1905) 30 Bom. 37

DAMDUPAT—*Hindu Law—Interest—Interest accrued due not affected by the rule of damdupat.*] Plaintiff advanced Rs. 714 to the defendant. The whole of this sum was repaid by the defendant. The plaintiff then sued to recover Rs. 33-9-2, being the amount of interest over the amount from the date of the loan to the date of its repayment. The defendant raised the plea of *damdupat*, alleging that no sum was due as principal at the date of suit, so none could be recovered by way of interest.

Held, that the claim should be allowed; since the rule of *damdupat* had no application to right that has already accrued.

The rule of *damdupat* does not divest rights that have accrued; it merely limits accruing rights.

A suit against a Hindu debtor for interest actually and legally accrued is not barred merely because the principal sum lent has been paid off.

NUSSERWANJI *v.* LAXMAN ... (1906) 30 Bom. 452

DECLARATION—*District Municipal Election Rules, Rule 13—Plaintiff candidate for election as Councillor—Plaintiff's name not published in the list of candidates—Receiving Officer—Suit against Municipality—Injunction.*

See DISTRICT MUNICIPAL ACT ... 409

DECREE—*Conciliation agreement—Dekkhan Agriculturists' Relief Act (XVII of 1879), sec. 44—Execution proceedings—Pensions Act (XXIII of 1871), sec. 4—“Suit”—Payment of annuity charged on Saranjam lands—Liability of the son of the grantor to make the payment—Partition of family property—Income of a Saranjam village.*

See PENSIONS ACT ... 101

DECREE AGAINST SURETY—*Execution against Surety—Practice and procedure—Civil Procedure Code (Act XIV of 1882), sec. 253.*

See CIVIL PROCEDURE CODE ... 506

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879)—*Redemption suit—Sale out and out—Written document—Oral evidence for construing the document—Evidence of intention—Admissibility—Indian Evidence Act (I of 1872), sec. 92.*

See EVIDENCE ACT ... 126

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SEC. 44—*Pensions Act (XXIII of 1871), section 4—"Suit"—Execution proceedings—Payment of annuity charged on Saranjām lands—Liability of the son of the grantor to make the payment—Partition of family property—Income of a Saranjām village—Conciliation agreement—Decree.*] A conciliation agreement was filed in Court on the 16th June 1882 under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). It effected partition of family property between two brothers, A and N. Under the agreement A undertook to pay to N Rs. 456-0-6 every year, and for the convenience of the parties this was to come out of the Saranjām lands which had fallen to the share of A. The payment was regularly made during the life-time of A, and after his death, T, the son of A, continued to make the payment till 1899, when he stopped making any more payment. B, the son of N who had died, then filed a *darkhast* to enforce the payment of 1899-1900. T objected to this *darkhast* on two grounds: (1) that a certificate under the Pensions Act (XXIII of 1871) was necessary; and (2) that A's interest having terminated with his death, the Saranjām must be considered as a fresh grant to the son who was not liable to continue the payment.

Held, (1) that a certificate under the Pensions Act (XXIII of 1871) was not necessary, for the word "suit" in section 4 of the Act does not include execution proceedings.

Vajiram v. Ranchordji (1892) 16 Bom. 731, followed.

Held (2) that A was a trustee in respect of the Rs. 456-0-6 for Narayan, the obligation to pay which would attach to the succeeding holders of the Saranjām and it followed that N and his descendants would have the right to call upon A and his descendants to account for their management of the Saranjām and pay to them Rs. 456-0-6 per annum.

A consent decree can only be set aside upon the same grounds as an agreement can be set aside, *e.g.*, fraud or mistake or misrepresentation.

Per BATTY, J.—"A Court executing a decree cannot question the jurisdiction of the Court which passed it."

"The present application in no way affects property falling within the purview of the Pensions Act, but seeks enforcement against the general assets of the judgment-debtor whose liability under the decree is not made a charge on the Saranjām or cash allowance at all. That liability appears to have been imposed and accepted not as effecting any partition of the Saranjām property, but for the purpose of effecting equality in the partition of non-Saranjām property, the Saranjām property being merely indicated as a fund available to the defendant for the purpose of discharging that liability."

THIMBAKRAO v. BALVANTRAO ... (1905) 30 Bom. 101

DEVASTHAN COMMITTEE—*Powers of appointment and dismissal of Moktesars—Powers exercisable in the interests of the Devasthan—Dismissal of Moktesar—Good and sufficient cause—Burden of proof.*] The powers of appointment and dismissal of Moktesars with which a Devasthan Committee are vested are exercisable not in their own interests, but in the interests and on behalf of the Devasthan, of which they are trustees. They are not at liberty to appoint or dismiss arbitrarily, capriciously or for private reasons of their own, but only on grounds justified by the interests of the institution.

When a Moktesar is dismissed by a Devasthan Committee, the burden of proof is on him to show that the Committee did not act on a *bona fide* belief that the dismissal was necessary in the interests of the Devasthan, but had been actuated by some other improper motive.

BHAVANISHANKAR v. TIMMANNA ... (1906) 30 Bom. 508

DISCOVERY ON OATH—*Advocate General—Affidavit of documents by order of the Prothonotary against Advocate General—Power of the Court—Prerogative of the Crown—Practice—High Court Rule 80a—Civil Procedure Code, sec. 129.* ... 474

See ADVOCATE GENERAL

DISTRICT MUNICIPAL ACT (BOM. ACT III OF 1901)—*District Municipal Election Rules, Rule 13—Plaintiff candidate for election as Councillor—Plaintiff's name not published in the list of candidates—Receiving Officer—Suit against Municipality—Declaration—Injunction.* The plaintiff offered himself as a candidate to be elected a Councillor in the Municipal elections, but his name was not included in the list of candidates published by the Receiving Officer appointed by the Collector under Rule 13 of the District Municipal Election Rules. The plaintiff thereupon brought a suit against the Municipality for a declaration that he was entitled to be elected a Councillor at the elections and for an injunction restraining the Municipality from holding the elections without accepting him as a candidate and without receiving the votes of his voters.

The first Court rejected the plaint on the ground that it disclosed no cause of action. On appeal by the plaintiff the Judge reversed the order and remanded the proceedings for decision of the suit according to law.

On appeal by the Municipality.

Held, reversing the order of remand, that the suit for a declaration against the Municipality could not lie because the Municipality neither denied nor was interested to deny the character or right which the plaintiff sought to establish. It was the officer mentioned in Rule 13 of the District Municipal Election Rules that was concerned with that question and over him the Municipality had no control.

The claim for an injunction could not be sustained against the Municipality when it had done no wrong and had proposed to proceed in accordance with the District Municipal Act (Bom. Act III of 1901) and the rules so far as they relate to it.

SURAT CITY MUNICIPALITY v. CHUNILAL ... (1906) 30 Bom. 409

DIVORCE—*Mahomedan Law—Hanafi Sunnis—Talak-ul-bain by one pronouncement in the absence of the wife—Execution of talaknama in the presence of the Kazi—Communication of the divorce to the wife—Marz-ul-maut—Death of the husband before expiration of the period of iddat.* A, a Mahomedan belonging to the Hanafi Sunni sect, took with him two witnesses and went to the Kazi and there pronounced but once the divorce of his wife (plaintiff) in her absence. He had a *talaknama* written out by the Kazi, which was signed by him and attested by the witnesses. A then took steps to communicate the divorce and make over the *iddat* money to the plaintiff, but she evaded both. A died soon after this. The plaintiff thereupon filed a suit alleging that she was still the wife of A and claimed maintenance and residence.

Held, overruling the contention that the divorce should have been pronounced three times, that the *talak-ul-bidaat* (i.e., irregular divorce) is good in law, though bad in theology.

Held further, in answer to the contention that the divorce was not final as it was never communicated to the plaintiff, that a *bain-talak*, such as the present, reduced to manifest and customary writing, took effect immediately on the mere writing. The divorce being absolute, it is effected as soon as the words are written "even without the wife receiving the writing."

In order to establish *Marz-ul-maut* there must be present at least three conditions:—

(1) Proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khauf* or apprehension, that is, that at the given time death must be more probable than life:

(2) there must be some degree of subjective apprehension of death in the mind of the sick person :

(3) there must be some external indicia, chief among which would be the inability to attend to ordinary avocations.

Where an irrevocable divorce has been pronounced by a Mahomedan husband in health, and the husband dies during the period of the discarded wife's *iddat*, she has no claim to inherit to the husband.

SARADAI v. RAEIABAI ... (1905) 30 Bom. 537

DOWER, NON-PAYMENT OF—*Suit for restitution of conjugal rights—Consummation of marriage—Mahomedan Law.*

See MAHOMEDAN LAW ... 122

EASEMENTS ACT (V OF 1882), SEC. 28, CL. (c)—*Disturbance of Easements—Meaning of disturbance—Injunction to prevent disturbance—Light and Air—Physical comfort—Substantial damage.*] The Indian Easements Act is not merely prescriptive ; it defines the law relating to easements and thus differs from the English Act in its ambit.

Section 28, clause (c) of the Act provides that the extent of a prescriptive right to the passage of light and air to a certain window, door, or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purpose for which it has been used.

PER CURIAM:—"In any case I see no reason for withholding from disturbance its legal sense of an illegal obstruction, and, for the purpose of chapter IV, that only can (in my opinion) be an illegal obstruction, for which, if done, a suit would lie. Therefore I hold that for an injunction there must be a threat of something more than mere obstruction and so the plaintiffs' first contention fails."

To establish that the plaintiffs have suffered substantial damage to their rights to light and air they must show material diminution in the value of their heritage or material interference with their physical comfort.

The expression "physical comfort" does not admit of precise definition, but it is sufficiently exact when applied as a test to a given state of things to allow the ordinary reasonable man to arrive at a practical determination. A man's physical comfort in relation to the access of light and air to his house at any particular time depends upon the conditions then actually obtaining, regardless of how these conditions came into being or when they may cease : it is a present fact uninfluenced by past history or future fate.

Therefore for the purpose of applying the test of the plaintiffs' physical comfort we must look at the state of their property as it is, not as it was, or as it may be.

FRAMJI SHAPURJI v. FRAMJI EDULJI ... (1905) 30 Bom. 319

EVIDENCE—*Consideration and weight of evidence—Alleged substitution of one boy for another in infancy—One-sided enquiries made to support allegation—Evidence not judicially taken and without notice to interested parties.*] The question in issue was whether the appellant, defendant in the suit, was entitled to the name he bore and to the property in dispute of which he had long been in possession, or whether, as maintained by the respondent, the plaintiff in the suit, the real heir to the property died in infancy, and the appellant when a boy, was fraudulently substituted for him. The first Court found in favour of the appellant, but the High Court reversed that decision mainly on evidence taken on enquiries made under official orders, the effect of which was to place the services of the officials employed at the disposal of the pleader for the respondent in order to enable him to obtain material in support of his case.

Held by the Judicial Committee that even if admissible the evidence so taken was of little, if any, value. It was taken to support a foregone conclusion: the enquiries were secret: no notice was given to anybody on behalf of the boy: nobody was present throughout the enquiries to represent the boy or protect his interests: there was nobody to check the mode in which the alleged statements were elicited, whether by leading questions or otherwise: nobody to test the statements by cross-examination: nobody to watch the accuracy with which they were recorded. Considering the purpose, the nature and the circumstances of the enquiries, which, if they were official in any sense, were certainly not judicial, no weight could be given to the proceedings at, or the results of, those enquiries. The judgment of the High Court was therefore reversed.

CHANDRASANGJI v. MOHANSANGJI ... (1906) 30 Bom. 523

EVIDENCE ACT (I OF 1872), sec. 92—*Redemption Suit—Sale out-and-out—Construction—Evidence of intention—Admissibility.* Plaintiffs, who were agriculturists, brought a suit to redeem and the defendant contended that the transaction in suit was a sale out-and-out and not a mortgage. The lower Courts held that the transaction was a mortgage and allowed redemption.

Held, on second appeal by the defendant, that evidence of intention cannot be given for the purpose merely of construing a document which purported to be a sale out-and-out and not a mortgage; section 92 of the Indian Evidence Act (I of 1872), subject to the proviso therein contained, forbids evidence to be given of any oral agreement or statement for the purpose of contradicting, varying, adding to or subtracting from the terms of any contract, grant or other disposition of property the terms of which have been reduced to writing as mentioned in that section.

While there are restrictions on the admissibility of oral evidence, section 92 in its first proviso recognizes that facts may be proved by oral evidence which would invalidate a document or entitle any person to any decree or order relating thereto. And where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently.

ABAJI v. LAXMAN ... (1906) 30 Bom. 423

—*Mortgage—Contemporaneous oral agreement or statement of intention—Inference from circumstances.* The plaintiff sued to recover possession of land contending that the document under which the defendants held the land, though in form an absolute conveyance, was intended to operate merely as a mortgage. The plaintiff's contention was based on the grounds that the consideration was a previously existing debt and not money paid at the time; that the plaintiff's father, notwithstanding the execution of the deed, remained in possession until his death and that after his death his widow remained in possession for three years; that there was no transfer of the land into the *khata* of the transferee and that the consideration was grossly inadequate.

The first Court held the transaction to be an out-and-out sale and dismissed the suit.

On appeal by the plaintiff.

Held, confirming the decree, that the meaning of the contention of the plaintiff was that the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred from the said several circumstances relied on, but that in questions of this kind Courts in India must be guided by section 92 of the Evidence Act (I of 1872), and cannot have recourse to those equitable principles which enable the Court of Chancery to give relief in those cases of which *Alderson v. White* (1858) 2 De G. & J. 98 or *Lincoln v. Wright*

(1859) 4 De G. & J. 16 furnish examples. This, however, would not have precluded the plaintiff from relying on the provisos to the section, had any of them been applicable.

DATTOO v. RAMCHANDRA	...	...	...	(1905) 30 Bom. 119
EX PARTE ORDER—Practice.				
See PRACTICE	...	...	...	... 173
EXECUTION—Attachment—Private sale pending attachment—Suit by vendee for recovery of possession—Civil Procedure Code (Act XIV of 1882), sections 276, 305.				
See CIVIL PROCEDURE CODE	...	...	...	... 337
Decree against Surety—Execution against Surety—Practice and procedure—Civil Procedure Code (Act XIV of 1882), section 253.				
See CIVIL PROCEDURE CODE	...	...	...	... 504
Decree for possession—Obstruction—Application for removal of obstruction numbered and registered as suit—Civil Procedure Code (Act XIV of 1882), chapter XIX, div. H—Adverse possession—Limitation.				
See LIMITATION	...	...	...	... 115
Pensions Act (XXIII of 1871), section 4—"Suit"—Payment of annuity charged on Saranjām lands—Liability of the son of the grantor to make the payment—Partition of family property—Income of a Saranjām village—Conciliation agreement—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 44—Decree.				
See PENSIONS ACT	...	...	...	... 101
Suit of the nature cognizable in the Court of Small Causes—Second appeal.				
See SECOND APPEAL	...	...	...	... 113
FIRM, SUIT AGAINST—Addition of the names of partners constituting the firm—Jurisdiction of the Court to entertain suit—Rules and Forms of the Bombay High Court, Rule 361—Leave of the Court—Letters Patent, clause 12.				
See LETTERS PATENT	...	...	...	... 364
FORFEITURE—Land Revenue Code (Bombay Act V of 1879), sections 56, 57, 153—Arrears of assessment—Forfeiture by Government—Mortgage—Land in possession of the occupant—Re-grant by Government to the occupant—Suit by mortgagee to recover possession—Equities arising out of the conduct of the parties.] Forfeiture ordinarily implies the loss of a legal right by reason of some breach of obligation.				
When arrears of assessment are levied by sale, then section 56 of the Land Revenue Code (Bombay Act V of 1879) in pursuance of an obvious policy, empowers the Collector to sell "freed from all tenures, incumbrances and rights created by the occupant.....or any of his predecessors-in-title or in anywise subsisting against such occupants." Should the Collector otherwise dispose of the occupancy, the section affords no such protection, and the legal relations must be determined by reference to the ordinary law. So judged, the effects of a forfeiture and the subsequent acquisition of the forfeited property are subject to the control of equities arising out of the conduct of the parties.				
<i>Balkrishna Vasudev v. Madhavrao Nurayan</i> (1880) 5 Bom. 73, followed.				
ANOLAK BANECHAND v. DHONDI	...	...	...	(1906) 30 Bom. 466
FORFEITURE OF PARDON—Accomplice—Pardon—Grant of conditional pardon—The pardoned accomplice giving full and true story of the crime, but retracting				

it in cross-examination before the Sessions Court—Order of Sessions Court to Committing Magistrate to withdraw the pardon—Trial of accused for the offence—Commitment—Conviction on his plea of guilty—Irregularity—Illegality—Practice and procedure—Criminal Procedure Code (Act V of 1898), sections 337, 338.

See CRIMINAL PROCEDURE CODE ... 611

FRAUD—*Defence—Limitation.*

See RES JUDICATA ... 395

GAMBLING—*Bombay Prevention of Gambling Act (Bombay Act IV of 1887), section 12—Gambling in a railway carriage—Through special train—Public place—Railway track—Public having no right of access except passengers.* The accused were convicted under section 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) as persons found playing for money in railway carriage forming part of a through special train running between Poona and Bombay while the train stopped for engine purposes only at the Reversing Station (on the Bore Ghauts between Karjat and Khandála Stations) of the Great Indian Peninsula Railway.

Held, reversing the conviction, that a railway carriage forming part of a through special train is not a public place under section 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887).

Per JENKINS, C. J.—The word “place” [in section 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887)] is, I think, qualified by the word “public” and having regard to its context and its position in that context, it must, in my opinion mean a place of the same general character as a road or thoroughfare..... I am unable to regard the railway carriage, in which the accused were, as possessing such characteristics of, or bearing such a general resemblance to, a street or thoroughfare as to justify us in holding that it was a public place within the meaning of section 12 of the Act, with which alone we are concerned.

Per RUSSELL, J.—The adjective “public” [in section 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887)] applies to all the three nouns—street, place or thoroughfare, and it is clear that the railway line certainly cannot be described as a “public street or thoroughfare” inasmuch as it is not and cannot be used by the public in the same way as they are in the habit of using “public streets” and “thoroughfares.”

EMPEROR v. HUSSEIN ... (1905) 30 Bom. 318

GIFT—*Gift by will of the residue to such charities as the trustees may think deserving, is good—Indian Succession Act (X of 1865), sections 20, 22, 105—Relationships contemplated by the Act are legitimate relationships only.*

See SUCCESSION ACT ... 500

———*Law of Native State—Law in British India—Difference—Burden of proof—Trustee—Cestui que trust—Confidential relation.* It lies on him who asserts it to prove that the law of the Native State differs from the law in British India, and in the absence of such proof it must be held that no difference exists except possibly so far as the law in British India rests on specific Acts of the Legislature.

Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the Court that the person by whom the benefits have been conferred had competent and independent advice in conferring them. This applies to the case of trustee and cestui que trust.

Vaughton v. Noble (1861) 30 Beav. 34 at page 39 and *Liles v. Terry* [1805] 2 Q. B. 679 at page 686, followed.

RAGHUNATH v. VARJIVANDAS ... (1906) 30 Bom. 578

GRANT—*Cantonment property—Notice of resumption—Offer of compensation—Condition precedent—Notice to one of three executors—Joint occupants.*

See CANTONMENT PROPERTY 137

GUARDIANS AND WARDS ACT (VIII OF 1890)—*Investment by guardians of minor's property—Principles governing investment by guardians—Indian Trusts Act (II of 1882), section 20.* Guardians are in a fiduciary position and the Court should be guided by the rules embodied in the Trusts Act in sanctioning changes in the investment of a minor's property. The duty of guardians is primarily to preserve and not to add to the property of the minor.

Where it was sought to invest monies belonging to a minor in the purchase of lands deriving their income from buildings erected thereon,

Held, that the proposed investment not being one which trustees would be authorised to make, the Court must withhold its sanction.

Leahey v. Whiteley (1887) 12 App. Cas. 727 at page 733 followed and applied.

IN RE CASSUMALI (1906) 30 Bom. 591

SECS. 34, 35, 36 AND 37—*Minor—Guardian—Administration bond passed to Judge—Refusal of the Judge to assign—Appeal.* No appeal lies from an order passed by the District Judge under section 35 of the Guardians and Wards Act (VIII of 1890) declining to assign the bond.

A bond under section 34 of the Guardians and Wards Act (VIII of 1890) is to be given to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed engaging duly to account for what the guardian may receive in respect of the property of the ward. There is nothing in the section or in the form, as given in the schedule of the High Court Circular Orders, which suggests that the bond ceases to operate either on the death of the guardian or of the ward or on the ceasing or otherwise of the guardianship, so that a right of suit would still continue notwithstanding the happening of these events.

The District Judge can in his discretion under such circumstances assign such a bond to a proper person.

GANPAT V. ANNA (1905) 30 Bom. 164

SECS. 39 AND 52—*Minors—Guardian of person—Guardian of property—Minor having proprietary interest with adults in joint family—Joint family comprising all minors—Guardianship liable to cease as soon as there is an adult person.* A guardian of the property cannot be appointed for a minor whose only proprietary interest is as co-parcener with adults in a joint family property.

This principle does not apply when all the co-parceners are minors and a guardian of the property is appointed for the whole number, *Lingangowda v. Gangabai* (1896) P. J. p. 521, followed.

As soon as there is an adult co-parcener, any guardianship of the property previously constituted either ceases or is liable to cease.

An order appointing a guardian of the property of minor co-parceners, who exclusively constitute the joint family, should reserve liberty to any minor on attaining majority to apply for the removal of the guardian of the property or restrictions of his power under section 52 of the Guardians and Wards Act (VIII of 1890).

BINDAJI V. MATHURABAI (1905) 30 Bom. 152

GUJARAT TALUKDARS' ACT (BOM. ACT VI OF 1888) SECS. 10, 11, 16 AND 17—*Talukdars' Settlement Officer—Decision—Appeal—Second appeal—Subsequent suit in a Court of competent jurisdiction—Res judicata.* Certain proceed-

ings which had arisen out of an application to the Talukdári Settlement Officer under section 11 of the Gujarát Talukdárs' Act (Bombay Act VI of 1888) went up to the High Court in second appeal.

Subsequently the same question having arisen between the same parties in a regular suit in a Court of competent jurisdiction.

Held, that the question was not *res judicata*. A Talukdári Settlement Officer is not a Court of jurisdiction competent to try the suit. He is an administrative officer according to the machinery prescribed by the Bombay Legislature.

"In considering the competency of a Court for the purpose of deciding on a question of *res judicata*," the Court "must look to the powers of the Court in which the suit was instituted, and not to the powers of the Court by which that suit was decided on appeal."

Toponidhee Dhiraj Gir Gosain v. Sreeputty Sahanee (1880) 5 Cal. 832 at p. 838, followed.

MALUBHAI v. SURSANGJI	...	...	...	(1905) 30 Bom.	220
GURAV SERVICE— <i>Vritti—Stridhan—Saudayik—Bequest by will—Power of disposal subject to husband's consent.</i>					
See STRIDHAN	...	...	...	...	220
HIGH COURT— <i>Original Side—Suits by manager of joint Hindu family having minor co-parceners—Minor's names should be added as parties—Practice.</i>					
See PRACTICE	...	...	...	...	477
— <i>Suit to recover an ascertained sum as profits of land—Provincial Small Cause Court Act (IX of 1887), schedule II, article 31—Jurisdiction of Small Cause Court—Second appeal—Practice.</i>					
See SMALL CAUSE COURT ACT	...	...	...	...	147
HIGH COURT RULE 80a— <i>Advocate General—Affidavit of documents by order of the Prothonotary against Advocate General—Power of the Court—Privilege of the Crown—Practice—Civil Procedure Code, section 129.</i>					
See ADVOCATE GENERAL	...	...	...	...	474
—361— <i>Suit against a firm—Addition of the names of partners constituting the firm—Practice and Procedure—Jurisdiction of the Court to entertain suit—Letters Patent, clause 12]</i> Rule 361 of the Rules and Forms of the Bombay High Court does not extend the jurisdiction of the Court: it merely sanctions the use of the firm's name as a convenient description of its several members and exempts a plaintiff from the obligation of setting forth their names at length.					
SHAW WALLACE & Co. v. GORDHANDAS	...	...	...	(1905) 30 Bom.	364
HINDU LAW— <i>Cutchi Memons—Succession—Marriage in approved form.</i>					
See CUTCHI MEMONS	...	...	...	...	197

—*Inheritance—Law of Bombay School—Mitakshara—Vyavahara Mayukha—Succession to Stridhan—Co-widow—Husband's brother—Husband's brother's son—Deed of gift, construction of—Absolute or limited estate of inheritance—Vyavahara Mayukha, chapter IV, section 10, placita 28 and 30, construction of.* By the Hindu law of the Bombay School, viz., the Mitakshara subject to the doctrine to be found in the Vyavahara Mayukha where the latter differs from it, a co-widow is entitled to succeed to the property of a woman dying without issue, in preference to her husband's brother or husband's brother's son.

A deed executed by a Hindu in favour of his future wife conveyed immoveable property to her, "her heirs, executors, administrators, and assigns" on the

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condition that if she died "without leaving issue of the intended marriage who shall succeed to a vested interest" in the property, and without exercising a power of appointment given her by the deed, then "the property shall vest in her legal heirs according to the Hindu law of the Bombay School."

Held, that she took an absolute estate of inheritance in the property.

The true construction of *placitum* 30 of chapter IV, section 10, of the Vyavahara Mayukha, and one that brings it into harmony with the Mitakshara, and also reconciles it with *placitum* 28, is that it should be read distributively as regards the property of women married according to one of the approved forms and the property of those married in one of the lower forms. In the one case those of the heirs enumerated by Brihaspati who are blood relations of the husband, namely, the husband's sister's son, the husband's brother's son, and the husband's brother will succeed to the woman's property and in the other case the relations of the father will succeed.

The order of succession is not indicated in the series of heirs enumerated by Brihaspati. The solution is to be found by reference to *placitum* 28 in which the heirs are described as the nearest sapindas of the wife in the husband's family, or the nearest to her in her father's family, as the case may be. The list is not exhaustive, and neither a co-widow nor any other sapinda of the husband is excluded. The words "and the rest" mean or include the other relations of the husband or father. The co-widow therefore takes in her right place and is a preferential heir to the husband's brother or husband's brother's son.

BAI KESSERBAI v. HJNSRAJ MORARJI ... (1906) 30 Bom. 431

HINDU LAW—Interest—Damdupat—Interest accrued due not affected by the rule of damdupat.] Plaintiff advanced Rs. 714 to the defendant. The whole of this sum was repaid by the defendant. The plaintiff then sued to recover Rs. 33-9-2, being the amount of interest over the amount from the date of the loan to the date of its repayment. The defendant raised the plea of *damdupat*, alleging that no sum was due as principal at the date of suit, so none could be recovered by way of interest.

Held, that the claim should be allowed; since the rule of *damdupat* had no application to right that has already accrued.

The rule of *damdupat* does not divest rights that have accrued; it merely limits accruing rights.

A suit against a Hindu debtor for interest actually and legally accrued is not barred merely because the principal sum lent has been paid off.

NUSSEERWANJI v. LAXMAN ... (1906) 30 Bom. 452

Kutchi Memons—Succession—Sons administering the property of their deceased father.] Among the Kutchi Memons, who are governed by Hindu Law, the sons as heirs are entitled to the estate of their deceased father, subject to the payment of his debts. They are, therefore, entitled to take possession of their father's property, to administer it, and to pay debts without being liable to account to the Court otherwise than as heirs.

Veerasakkaraju v. Papiak (1902) 26 Mad. 792, followed.

HARI SAEED v. ALLY MAHOMED ... (1904) 30 Bom. 270

Mitakshara—Co-widows—Deceased co-widow—Stridhan property of the deceased—Surviving co-widow entitled to succeed—Nearest surviving Sapinda of the husband.] According to the Mitakshara a surviving co-widow is entitled to succeed to the *stridhan* property of her deceased co-widow as the nearest surviving *Sapinda* of the husband.

KRISHNAJI v. SHRIPATI ... (1905) 30 Bom. 333

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<i>See</i> STRIDHAN 	229
————— <i>Stridhan—Succession—Full brothers of the husband are entitled to succeed in preference to his half-brothers—Mitakshara.</i> A Hindu widow died without issue leaving her surviving one whole brother and three half-brothers of her deceased husband :	
<i>Held</i> , that under the Mitakshara by which the parties were governed, for the purpose of succession to the non-technical stridhan of a widow who has died without issue, the whole brother of her deceased husband is to be preferred to his half-brother.	
PARMAPPA <i>v.</i> SHIDDAPPA 	(1906) 30 Bom. 607
————— <i>Suits by manager of joint Hindu family having minor co-parceners—Minors' names should be added as parties—High Court—Original Side—Practice.</i>	
<i>See</i> PRACTICE 	477
INHERITANCE— <i>Hindu Law—Law of Bombay School—Mitakshara—Vyavahara Mayukha—Succession to Stridhan—Co-widow—Husband's brother—Husband's brother's son—Deed of gift, construction of—Absolute or limited estate of inheritance—Vyavahara Mayukha, chap. IV, sec. 10, placita 28 and 30, construction of.</i>	
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INJUNCTION— <i>Plaintiff candidate for election as Councillor—Plaintiff's name not published in the list of candidates—Receiving Officer—Suit against Municipality—Declaration—District Municipal Election Rules, Rule 13—District Municipal Act (Bom. Act III of 1901).</i>	
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INSOLVENCY ACT (11 & 12 VICT., c. 21), SEC. 31— <i>Sale by Official Assignee—Sanction of the Court—Power of Court to set aside a completed sale.</i> Under the Indian Insolvent Act the Official Assignee has full power to sell the property and effects of an insolvent, and it is his duty to make sale of the same with all convenient speed. The sanction of the Court to the sale is not necessary.	
Section 31 of the Indian Insolvent Act does not vest the Court with power to set aside completed sale.	
WOONWALLA and Co. <i>v.</i> N. C. MACLEOD 	(1906) 30 Bom. 515
INTEREST— <i>Hindu Law—Damdapat—Interest accrued due not affected by the rule of damdupat.</i>	
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<i>See</i> CRIMINAL PROCEDURE CODE 	49

JUDICIAL OFFICERS ON TOUR—*Judicial Officers' Protection Act (XVIII of 1850).*] *Held*, that Judicial officers, whose official movements may leave them open to the charge that they wilfully compel parties who appear before them to follow the movements of their camp, should strive to exercise their powers with such consideration for such parties as will secure them from any imputation of misconduct in this respect.

GIRJASHANKAR v. GOPALJI ... (1905) 30 Bom.

JUDICIAL OFFICERS' PROTECTION ACT (XVIII OF 1850)—*Civil Procedure Code (Act XIV of 1882), sec. 199—Suit against a Magistrate to recover damages—Judgment written by a Judge after his transfer—Proceedings before a Magistrate for arrears of Municipal revenue—Jurisdiction—Protection afforded to judicial officers—Public policy—Judicial officers on tour.*] To secure protection under the Judicial Officers' Protection Act (XVIII of 1850) the defendant must show,

1st. That the act complained of was done, or ordered by him in the discharge of his judicial duty; and

2nd. That it was within the limits of his jurisdiction, or if not within those limits, that he, at the time, in good faith believed himself to have jurisdiction to do or order the acts complained of.

In a suit against a Magistrate to recover damages for injury to the plaintiff on account of the highly arbitrary, spiteful and illegal conduct of the defendant—the conduct being in the course of proceedings instituted by a Municipality against the plaintiff before the defendant as Magistrate for the recovery of arrears of house-tax—the plaintiff contended that the defendant had no jurisdiction to entertain the proceedings because the arrears were paid before the proceedings were commenced,

Held, that the case was one which the Magistrate was competent to entertain and none the less because in the result it might appear that there was nothing due. Jurisdiction for the purpose in hand rested, not on the proof adduced in support of the charge, but on the nature of the charge actually made.

The protection afforded to judicial officers rests on public policy. And although thereby a malicious Judge or Magistrate may gain a protection designed not for him, but in the public interest, it does not follow that he can exercise his malice with impunity. His conduct can be investigated elsewhere and due punishment awarded.

Judicial officers, whose official movements may leave them open to the charge that they wilfully compel parties who appear before them to follow the movements of their camp, should strive to exercise their powers with such consideration for such parties as will secure them from any imputation of misconduct in this respect.

GIRJASHANKAR v. GOPALJI ... (1905) 30 Bom. 241

JURISDICTION—*Cause of action—Letters Patent, cl. 12—Contract Act (IX of 1872), secs. 43—49, 94—Commission Agent—Place of payment of debt.*

See LETTERS PATENT ... 167

—————*Civil Procedure Code (Act XIV of 1882), sec. 17, cl. (c)—One of the defendants not residing within the jurisdiction of the Court—Leave given after institution of the suit.*

See CIVIL PROCEDURE CODE ... 570

—————*Decree passed by first Court allowing plaintiffs' claim—Appeal by defendant—Summary dismissal of appeal—Application by defendant to the first Court for review—Civil Procedure Code (Act XIV of 1882), secs. 551, 623.*

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<i>Provincial Small Cause Court Act (IX of 1887), sch. II, art. 31—Jurisdiction of Small Cause Court—Suit to recover an ascertained sum as profits of land—Second appeal—High Court—Practice.</i>	
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<i>Suit against a firm—Addition of the names of partners constituting the firm—Jurisdiction of the Court to entertain suit—Leave of the Court—Letters Patent, cl. 12—Practice and procedure.</i>	
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<i>Suit against a Magistrate to recover damages—Proceedings before a Magistrate for arrears of Municipal revenue—Protection afforded to judicial officers—Public policy—Judicial Officers' Protection Act (XVIII of 1850).]</i> In a suit against a Magistrate to recover damages for injury to the plaintiff on account of the highly arbitrary, spiteful and illegal conduct of the defendant—the conduct being in the course of proceedings instituted by a Municipality against the plaintiff before the defendant as Magistrate for the recovery of arrears of house-tax—the plaintiff contended that the defendant had no jurisdiction to entertain the proceedings because the arrears were paid before the proceedings were commenced, <i>Held</i> , that the case was one which the Magistrate was competent to entertain and none the less because in the result it might appear that there was nothing due. Jurisdiction for the purpose in hand rested, not on the proof adduced in support of the charge, but on the nature of the charge actually made.	
GIRJASHANKAR v. GOPALJI	(1905) 30 Bom. 241
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KHOTI ACT (BOM. ACT I OF 1880), SECS. 6, 7, 8, 9, 11 — <i>Khot—Occupancy tenant—Mortgage by occupancy tenant—Forfeiture.</i> [There is no authority for saying that an occupancy tenant, whose tenancy is not determined, forfeits his tenancy by parting temporarily with the possession of his land to another without resigning the land as completely as would be necessary, in the case of privileged occupants of another sub-class, to place the land at the disposal of the khot. And so long as his tenancy is not determined, the land is not at the disposal of the khot. And the khot cannot claim to treat the person in possession, under a right derived from the occupancy tenant, either as a trespasser or even as a yearly tenant, so long as the privileged occupant's rights remain undetermined by resignation, lapse or duly certified forfeiture.	
YESA DIN RAMA v. SAKHARAN GOPAL	(1905) 30 Bom. 290

KUTCHI MEMONS—Succession—Hindu Law—Sons administering the property of their deceased father.] Among the Kutchi Memons, who are governed by Hindu Law, the sons as heirs are entitled to the estate of their deceased father, subject to the payment of his debts. They are, therefore, entitled to take possession of their father's property, to administer it, and to pay debts without being liable to account to the Court otherwise than as heirs.

Vecrasokkaraju v. Papiiah (1902) 26 Mad. 792, followed.

Haji Saboo v. Ally Mahomed ...

... (1904) 30 Bom. 270

LAND ACQUISITION ACT (I OF 1894), SECS. 12, 18—Notice by the Collector—Reference to Court—Construction of statute—Meaning of word “immediately.” The provisions of the Land Acquisition Act for the compulsory acquirement of private property are made for the public benefit, and, in the case of such Acts, “if upon words or expressions at all ambiguous it would seem that the balance of hardship or inconvenience would be strongly against the public on the one construction or strongly against a private person on another construction, it is consistent with all sound principles to pay regard to that balance of inconvenience.”

Dixon's case (1880) 5 App. Cas. 827, followed.

The word “notice” as used in clause (b) of the proviso to section 18 of the Land Acquisition Act, I of 1894, means notice whether immediate or not. The clause in question prescribes one of two periods of limitation for a party who has not accepted the Collector's award, *viz.*, either six weeks from the date of the receipt of the Collector's notice, whether immediate or not, or six months from the date of the award: *whichever period shall first expire.*

Where a statute or written contract provides that a certain thing shall be done “immediately” regard must be had, in construing that word, to the object of the statute or contract as the case may be, to the position of the parties, and to the purpose for which the Legislature or the parties to the contract intend that it shall be done immediately.

The conditions prescribed by Section 18 of the Act are the conditions to which the power of the Collector to make the reference is subject, and these conditions must be fulfilled before the Court can have jurisdiction to entertain the reference.

Dixon v. Caledonian Railway Co. (1880) 5 App. Cas. 827, referred to. *Christie v. Richardson* (1842) 10 M. & W. 688, *Raleigh v. Atkinson* (1840) 6 M. & W. 677 and *In re the application of Sheshamma* (1887) 12 Bom. 276, followed.

IN RE LAND ACQUISITION ACT ... (1905) 30 Bom. 275

SEC. 18 (2)—Reference by Collector—Grounds of objection—Additional grounds urged before Court—Issues.] Section 18, sub-section 2 of the Land Acquisition Act requires that any person interested who has not accepted the Collector's award and requires the Collector to make a reference to the Court “shall state the grounds on which objection to the award is taken.” Such requirement is one of the conditions precedent to the obligation of the Collector to make the reference.

Held, that as section 147 of the Civil Procedure Code applied the claimant at the hearing is not confined to the grounds set out in his notice.

Held, further, that he is entitled to advance claims in respect of portions of the land taken up not referred to in his notice.

IN RE RUSTOMJI B. JINIBHAI ... (1905) 30 Bom. 341

LAND REVENUE CODE (BOM. ACT V OF 1879), SECS. 56, 57, 153—*Arrears of assessment—Forfeiture by Government—Mortgage—Land in possession of the occupant—Re-grant by Government to the occupant—Suit by mortgagee to recover possession—Equities arising out of the conduct of the parties.*] Forfeiture ordinarily implies the loss of a legal right by reason of some breach of obligation.

When arrears of assessment are levied by sale, then section 56 of the Land Revenue Code (Bom. Act V of 1879) in pursuance of an obvious policy, empowers the Collector to sell "freed from all tenures, incumbrances and rights created by the occupant.....or any of his predecessors-in-title or in anywise subsisting against such occupant." Should the Collector otherwise dispose of the occupancy, the section affords no such protection, and the legal relations must be determined by reference to the ordinary law. So judged, the effects of a forfeiture and the subsequent acquisition of the forfeited property are subject to the control of equities arising out of the conduct of the parties.

Balkrishna Vasudev v. Madhavarav Narayan (1880) 5 Bom. 73, followed.

AMOLAK BANECHAND v. DHONDI ... (1906) 30 Bom. 466

LEASE—*Lease by mortgagor—Sub-lease pendente lite—Rights of mortgagee.*] *Held*, that if a mortgagor left in possession grants a lease without the concurrence of the mortgagee, the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them.

MACLEOD v. KISSAN ... (1904) 30 Bom. 250

LEAVE TO SUE—*Letters Patent, cl. 12—Jurisdiction of the Court to entertain suit—Rules and Forms of the Bombay High Court, Rule 261—Suit against a firm—Addition of the names of partners constituting the firm—Practice and procedure.*

See LETTERS PATENT ... 364

—*One of the defendants not residing within the jurisdiction of the Court—Leave given after institution of the suit—Civil Procedure Code (Act XIV of 1882), sec. 17, cl. (c).*

See CIVIL PROCEDURE CODE ... 570

LETTERS PATENT, CL. 12—*Contract Act (IX of 1872), secs. 46–49, 94—Commission Agent—Place of payment of debt—Cause of action—Jurisdiction.*] The plaintiff, a commission agent and merchant carrying on business in Bombay, gave instructions to the defendants, also commission agents and merchants carrying on business at Phulgaon in the Birda Zilla, to enter into certain transactions on behalf of the plaintiff, and the defendants entered into those transactions as commission agents on behalf of the plaintiff. Accounts were sent and advices were transmitted from Phulgaon to the plaintiff in Bombay and from Bombay by the plaintiff to the defendants at Phulgaon. Subsequently the plaintiff having applied for leave under clause 12 of the Letters Patent brought a suit in the High Court at Bombay to recover the amount due from the defendants at the foot of the accounts between himself as principal and the defendants as commission agents at Phulgaon: the defendants pleaded want of jurisdiction.

Held, that as (1) instructions were sent to the defendants from Bombay, (2) accounts were rendered to the plaintiff (at Bombay) and (3) demand was made from Bombay to the defendants at Phulgaon, the payment of money therefore was clearly to be in Bombay.

PER CURIAM:—The expression cause of action means the bundle of facts, which it is necessary for the plaintiff to prove before he can succeed in his suit. Not irrelevant, immaterial facts, but material facts without which the plaintiff must

fail... If any of these material facts have taken place within the jurisdiction of the Court, then leave can be given under clause 12 of the Letters Patent. But if no such material facts have taken place within the jurisdiction of the Court and leave is given, then it is open to the defendant to contend at the hearing that the Court has no jurisdiction... Where no specific contract exists as to the place where the payment of the debt is to be made, it is clear, it is the duty of the debtor to make the payment where the creditor is.

MOTILAL v. SURAJMAL

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... (1904) 30 Bom. 167

LETTERS PATENT, CL. 12—*Leave of the Court—Jurisdiction of the Court to entertain suit—Rules and Forms of the Bombay High Court, Rule 361—Suit against a firm—Addition of the names of partners constituting the firm—Practice and Procedure.* The plaintiffs sued, on the 19th November 1904 on the Original Side of the Bombay High Court, "the firm of Shaw, Wallace & Co. as it was constituted on the 13th September 1898 and the partners in the said firm on that date." The action was for breach of an agreement dated the 13th of September 1898 executed by the defendant firm in favour of plaintiffs at Calcutta. The plaint alleged "the defendants carry on business in Bombay: part of the cause of action arose in Bombay." Prior to the service of summons and pursuant to a chamber order of 22nd December 1904, the plaint was on the 7th January 1905 amended by the addition of the names of Messrs. Wallace, Ashton, Greenway, Hue and Meakin. The first four were at the date of plaint and even afterwards carrying on business; and Secheran, one of the partners, having died in the meanwhile, his executor Meakin was also added as a party defendant. Before the death of Secheran, the partnership took in a new partner: and this new partnership opened a branch office in Bombay. Prior, however, to the presentation of the plaint, leave was granted under clause 12 of the Letters Patent. It was objected on behalf of the firm that leave under clause 12 should not have been granted: that the order allowing the amendment was wrong and that the Court had no jurisdiction to receive the suit:—

Held, (1) that Messrs. Wallace, Ashton, Greenway and Hue, according to the allegations in the plaint, were liable as co-partners to the plaintiffs and none the less because the estate of the deceased co-partner might also be liable together with them. It was also stated that they were carrying on business within the jurisdiction and this would be so though there might be associated with them a partner which was not a member of the firm when Shaw, Wallace & Co. entered into the agreement on which the suit was based.

(2) That the case fell within Rule 361 of the Rules and Forms of the Bombay High Court.

(3) That the suit as originally framed was rightly received irrespective of leave under clause 12 of Letters Patent and the defendants' contention that the Court had no jurisdiction failed.

(4) That Meakin, as the executor of Secheran, was wrongly added as a defendant.

As to the other four defendants the amendment was useless if they were already parties: if they were not then the amendment should not have been made except by an order of a judge seeing that leave had been obtained under clause 12 of the Letters Patent.

Rule 361 of the Rules and Forms of the Bombay High Court does not extend the jurisdiction of the Court: it merely sanctions the use of the firm's name as a convenient description of its several members and exempts a plaintiff from the obligation of setting forth their names at length.

SHAW, WALLACE & Co. v. GORDHANDAS

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... (1905) 30 Bom. 864

LETTERS PATENT, CLAUSE 13—*Transfer of suit—Civil cases—Power of High Court to remove suit from Court of Political Resident at Aden—Superintendence of High Court—Charter Act (24 and 25 Vict., c. 104), sec. 15—Aden Court's Act (II of 1864).*

See TRANSFER OF SUIT 246

LIGHT AND AIR—*Physical comfort—Substantial damage—Indian Easements Act (V of 1882), sec. 28, cl. (c)—Disturbance of Easements—Meaning of disturbance—Injunction to prevent disturbance.*

See EASEMENTS ACT 319

LIMITATION—*Civil Procedure Code (Act XIV of 1882), chap. XIX, div. H—Decree for possession—Execution of decree—Obstruction—Application for removal of obstruction numbered and registered as suit—Adverse possession.* On the 1st June 1889 defendant's husband Vishnu sold certain land to Vithal and passed to him a rent-note the period of which expired on the 20th March 1890. Subsequent to the expiry of the period, Vishnu, and after his death his widow, the defendant, continued in possession. Afterwards the plaintiffs, to whom the land had been sold, having obtained a decree for possession against the sons of Vishnu, Vishnu's widow, Kashibai, caused obstruction to delivery of possession in execution of the decree. The plaintiffs, thereupon, on the 22nd January 1902, applied for the removal of the obstruction and the Court, on the 26th July 1902, ordered that their application be numbered and registered as a suit between the decree-holders as plaintiffs and the claimant as defendant under section 331 of the Civil Procedure Code (Act XIV of 1882), chap. XIX, div. H.

Held, reversing the decree of the lower appellate Court, that the suit was not time-barred. The claimant was not entitled as against the decree-holders to count the time up to the 26th of July 1902, when the application was numbered as a suit, as the period of his adverse possession; for it had ended prior to the 20th March 1890, by reason of the proceedings under div. H. of chap. XIX of the Code of Civil Procedure, initiated on the 22nd of January 1902.

KRISHNAJI v. KASHIBAI (1905) 30 Bom. 115

—*Fraud—Defence.* *Held*, that a defendant is entitled to resist a claim made against him by pleading fraud, and he is entitled to urge that plea though he may have himself brought an unsuccessful suit to set aside the transaction, and is not under certain circumstances like those in hand precluded from urging that plea by lapse of time.

Rangnath v. Govind (1904) 28 Bom. 639, followed.

Mahomed v. Ezekil (1905) 7 Bom. L. R. 772, not followed.

MINALAL SHADIRAM v. KHARSETJI (1906) 30 Bom. 395

—*Money secured by a pledge—Suit for money lent—Three years from the time of the loan.* A suit for the recovery of money secured by a pledge is a suit for money lent. The period of limitation is three years from the time the loan is made.

YELLAPPA v. DESAYAPPA (1905) 30 Bom. 218

LIMITATION ACT (XV OF 1877)—*Applicability of—Mámlatdárs Courts Act (Bom. Act III of 1876), sec. 17—Possessory Suit—Decision—Duty of the Mámlatdár to order village officers to give effect to his order—Duty absolute and unqualified.* Where a Mámlatdár's decision awards possession, section 17 of the Mámlatdárs Courts Act (Bom. Act III of 1876) imposes on him the duty to issue an order to the village officers to give effect thereto. The duty is in no sense conditional on an application being made to the Mámlatdár for the purpose; it is absolute and unqualified.

Where such imperative duty is imposed upon a Court, then the Limitation Act (XV of 1877) has no application.

Kylasa Goundan v. Ramasami Ayyan (1881) 4 Mad. 172, *Vithal Janardan v. Vithojirav Puttajirav* (1882) 6 Bom. 586, *Ishwardas Jagjivandas v. Dosibai* (1882) 7 Bom. 316, and *Devidas Jagjivan v. Pirjada Begam* (1884) 8 Bom. 377 followed.

BALAJI v. KUSHABA ... (1906) 30 Bom. 415

LIMITATION ACT (XV OF 1877), SEC. 5—*Admission of appeal after prescribed time—Application for excuse of delay—Practice.*] To entitle a person to succeed on an application to excuse delay in presenting an appeal he must satisfy the Court that he had sufficient cause for not presenting an appeal within the prescribed period. When the time for appealing is once passed a very valuable right is secured to the successful litigant; and the Court must therefore be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages which he has obtained.

KARSONDAS DHARAMSEY v. BAI GUNGBAI ... (1905) 30 Bom. 329

LIQUIDATION—*Company—Indian Companies Act (VI of 1882), secs. 149, 214—Civil Procedure Code (Act XIV of 1882), secs. 111, 146, 561, 566—Ex parte order—Practice.*

See PRACTICE ... 173

MAHOMEDAN LAW—*Hanafi Sunnis—Divorce—Talak-ul-bain by one pronouncement in the absence of the wife—Execution of talaknama in the presence of the Kazi—Communication of the divorce to the wife—Marz-ul-maut—Death of the husband before expiration of the period of iddat.*] A, a Mahomedan belonging to the Hanafi Sunni sect, took with him two witnesses and went to the Kazi and there pronounced but once the divorce of his wife (plaintiff) in her absence. He had a *talaknama* written out by the Kazi, which was signed by him and attested by the witnesses. A then took steps to communicate the divorce and make over the *iddat* money to the plaintiff, but she evaded both. A died soon after this. The plaintiff thereupon filed a suit alleging that she was still the wife of A and claimed maintenance and residence.

Held, overruling the contention that the divorce should have been pronounced three times, that the *talak-ul-bidaat* (i.e., irregular divorce) is good in law, though bad in theology.

Held, further, in answer to the contention that the divorce was not final as it was never communicated to the plaintiff, that a *bain-talak*, such as the present, reduced to manifest and customary writing, took effect immediately on the mere writing. The divorce being absolute, it is effected as soon as the words are written "even without the wife receiving the writing."

In order to establish *Marz-ul-maut* there must be present at least three conditions:—

(1) Proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khawf* or apprehension, that is, that at the given time death must be more probable than life:

(2) there must be some degree of subjective apprehension of death in the mind of the sick person:

(3) there must be some external indicia, chief among which would be the inability to attend to ordinary avocations.

Where an irrevocable divorce has been pronounced by a Mahomedan husband in health, and the husband dies during the period of the discarded wife's *iddat*, she has no claim to inherit to the husband.

SARABAI v. RABIARAI ... (1905) 30 Bom. 537

MAHOMEDAN LAW—*Suit for restitution of conjugal rights—Non-payment of dower—Consummation of marriage.*] To a husband's suit for restitution of conjugal rights, the wife pleaded non-payment of dower. To this the husband pleaded consummation of marriage.

Held, that after consummation of marriage, non-payment of dower, even though proved, cannot be pleaded in defence of an action for restitution of conjugal rights.

Abdul Kadir v. Salima (1886) 8 All. 149, *Kunhi v. Moidin* (1888) 11 Mal. 327, and *Hamidunnessa Bibi v. Zohiruddin Sheikh* (1890) 17 Cal. 670, followed.

BAI HANSA v. ABDULLA

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... (1905) 30 Bom. 122

MALICIOUS PROSECUTION—*Suit for damages for malicious prosecution—Commencement of prosecution bonâ fide—Continuance malo animo—Reasonable and probable cause—Question of fact.*] The plaintiff was a member of a joint Hindu family to which a house in Jambusar belonged. The tax in respect of this house fell into arrears. Summary proceedings before a Magistrate were instituted by the Municipality under the District Municipal Act. The amount was paid after the institution of the proceedings and the prosecution ended without a decision on the merits. The plaintiff brought this suit for damages for malicious prosecution against 5 defendants, namely, (1) the Municipality of Jambusar, (2) and (3) the members of its Managing Committee, (4) its Secretary, and (5) its *Daroga*. The first Court dismissed the suit. The lower appellate Court passed a decree against defendants 1, 4 and 5 and awarded Rs. 55 as damages against them. On appeal to the High Court—

Held, that the suit should have been dismissed as against these defendants also, that the object of the Municipal Secretary being "to teach a minatory lesson to other defaulters on the disadvantages of non-payment of the tax", that could not be regarded as an indirect motive or as malice for the purposes of such a suit, it being a legitimate end of punishment to deter other evil-doers from offending in the same way.

Query.—Whether in such circumstances the Municipality could in any case be held liable for the malice imputed to its Secretary.

Held further, that the Secretary was no party to the proceedings which were instituted by or on behalf of the Municipality. It was not in his power to determine whether proceedings should be instituted nor did he institute them in fact.

Held, as to the *Daroga* that the facts failed to establish a sufficient ground for legal liability. Though a suit will lie for malicious continuance of proceedings, it was not shown that the *Daroga* took any active step after the payment or that he persevered *malo animo* in the prosecution or that he had the intention of procuring *per nefas* the conviction of the accused.

Fitzjohn v. Mackinder (1861) 30 L. J. (C. P.) 257 at p. 264, followed.

TOWN MUNICIPALITY OF JAMBUSAR v. GIRJASHANKER ... (1905) 30 Bom. 37

MAMLATDARS' COURTS ACT (BOM. ACT III OF 1876), SEC. 17—*Possessory Suit—Decision—Duty of the Māmlatdār to order village officers to give effect to his order—Duty absolute and unqualified—Limitation Act (XV of 1877) not applicable.*] Where a Māmlatdār's decision awards possession, section 17 of the Māmlatdār's Courts Act (Bom. Act III of 1876) imposes on him the duty to issue an order to the village officers to give effect thereto. The duty is in no sense conditional on an application being made to the Māmlatdār for the purpose; it is absolute and unqualified.

Where such imperative duty is imposed upon a Court, then the Limitation Act (XV of 1877) has no application.

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BALAJI v. KUSHABA ... (1906) 30 Bom. 415

MARKET—*City of Bombay Municipal Act* (Bom. Act III of 1888), secs. 410, 24, sch. D. (4)—*Prohibition of sale of fish except in a market—Sale from a basket placed on the Chowpati foreshore—Sale from a vessel—Private market—Onus of proof—City of Bombay, limits of—Bombay General Clauses Act* (Bom. Act I of 1904), sec. 3 (10).

See BOMBAY MUNICIPAL ACT ... 126

MARRIAGE, CONSUMMATION OF—*Suit for restitution of conjugal rights—Non-payment of dower—Mahomedan Law.*

See MAHOMEDAN LAW ... 122

MARZ-UL-MAUT—*Death of the husband before expiration of the period of iddat—Hanafi Sunnis—Divorce—Talak-ul-bain by one pronouncement in the absence of the wife—Execution of talaknama in the presence of the Kazi—Communication of the divorce to the wife—Mahomedan Law.* In order to establish *Marz-ul-maut* there must be present at least three conditions :—

(1) Proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khauf* or apprehension, that is that at the given time death must be more probable than life :

(2) there must be some degree of subjective apprehension of death in the mind of the sick person :

(3) there must be some external indicia, chief among which would be the inability to attend to ordinary avocations.

Where an irrevocable divorce has been pronounced by a Mahomedan husband in health, and the husband dies during the period of the discarded wife's *iddat*, she has no claim to inherit to the husband.

SARABAI v. RABIABAI ... (1905) 30 Bom. 537

MAYUKHA—*Hindu Law—Inheritance—Law of Bombay School—Mitakshara—Vyavahara Mayukha—Succession to Stridhan—Co-widow—Husband's brother—Husband's brother's son—Deed of gift, construction of—Absolute or limited estate of inheritance—Vyavahara Mayukha, chap. IV, sec. 10, placita 28 and 30, construction of.*

See HINDU LAW ... 431

MINOR—*Guardian—Administration bond passed to Judge—Refusal of the Judge to assign—Appeal—Guardians and Wards Act* (VIII of 1890), secs. 34, 35, 36 and 37.

See GUARDIANS AND WARDS ACT ... 164

—*Guardians and Wards Act* (VIII of 1890), secs. 39 and 52—*Guardian of person—Guardian of property—Minor having proprietary interest with adults in joint family—Joint family comprising all minors—Guardianship liable to cease as soon as there is an adult person.* A guardian of the property cannot be appointed for a minor whose only proprietary interest is as co-parcener with adults in a joint family property.

This principle does not apply when all the co-parceners are minors and a guardian of the property is appointed for the whole number, *Lingangevda v. Gangabai* (1896) P. J., p. 521, followed.

As soon as there is an adult co-parcener, any guardianship of the property previously constituted either ceases or is liable to cease.

An order appointing a guardian of the property of minor co-parceners, who exclusively constitute the joint family, should reserve liberty to any minor on attaining majority to apply for the removal of the guardian of the property or restrictions of his power under section 52 of the Guardians and Wards Act (VIII of 1890).

BINDAJI v. MATHURABAI ... (1905) 30 Bom. 152

MINOR—*Investment by guardians of minor's property—Principles governing investment by guardians—Indian Trusts Act (II of 1882), section 20—Guardian and Wards Act (VIII of 1890).*

See GUARDIANS AND WARDS ACT ... 591

MITAKSHARA—*Co-widows—Deceased co-widow—Stridhan property of the deceased—Surviving co-widow entitled to succeed—Nearest surviving Sapinda of the husband.* According to the Mitakshara a surviving co-widow is entitled to succeed to the stridhan property of her deceased co-widow as the nearest surviving Sapinda of the husband.

KRISHNAI v. SERIPATI ... (1905) 30 Bom. 333

—*Hindu Law—Inheritance—Law of Bombay School—Vyavahara Mayukha—Succession to Stridhan—Co-widow—Husband's brother—Husband's brother's son—Deed of gift, construction of—Absolute or limited estate of inheritance—Vyavahara Mayukha, chap. IV, sec. 10, placita 28 and 30, construction of.*

See HINDU LAW ... 431

MOKTESARS, POWERS OF APPOINTMENT AND DISMISSAL OF—*Devasthan Committee—Dismissal of Moktesar—Powers exercisable in the interests of the Devasthan—Good and sufficient cause—Burden of proof.*

See DEVASTHAN COMMITTEE ... 508

MORTGAGE—*Land in possession of the occupant—Arrears of assessment—Forfeiture by Government—Re-grant by Government to the occupant—Suit by mortgagee to recover possession—Equities arising out of the conduct of the parties—Land Revenue Code (Bom. Act V of 1879), secs. 56, 57, 153.*

See LAND REVENUE CODE ... 485

—*Two mortgages on the same property executed by the same person—Suit under the second mortgage for sale of the property subject to the first mortgage—Civil Procedure Code (Act XIV of 1882), sec. 43.* Where a mortgagee holds two mortgages on the same property executed by the same person, he cannot maintain a suit to recover the sum due on the later mortgage only, by sale of the property subject to the prior mortgage.

KESHAVRAM v. RANCHHOD ... (1905) 30 Bom. 156

—*Written document—Absolute conveyance—Contemporaneous oral agreement or statement of intention—Inference from circumstances—Indian Evidence Act (I of 1872), sec. 92.*

See EVIDENCE ACT ... 119

MUNICIPAL ELECTION—*District Municipal Election Rules, Rule 13—Plaintiff candidate for election as Councillor—Plaintiff's name not published in the list of candidates—Receiving Officer—Suit against Municipality—Declaration—Injunction—District Municipal Act (Bom. Act III of 1901).*

See DISTRICT MUNICIPAL ACT ... 409

MUNICIPALITY—*City of Bombay Municipal Act (Bom. Act III of 1888), sec. 3, clauses (w), (x) and (y), sec. 461—Building bye-laws Nos. 40, 42—Street—Construction.*

See BOMBAY MUNICIPAL ACT ... 558

- MUNICIPALITY**—*City of Bombay Municipal Act (Bom. Act III of 1888), sec. 249*
 —*Place of public resort—Theatre.*] A theatre is a place of public resort and as such falls within the purview of section 249 of the City of Bombay Municipal Act (Bom. Act III of 1888).
- EMPEROR v. DWARKADAS ... (1906) 30 Bom. 392
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- City of Bombay Municipal Act (Bom. Act III of 1888), secs. 410, 24, sch. D (4)*—*Prohibition of sale of fish except in a market—Sale from a basket placed on the Chowpati foreshore—Sale from a vessel—Private market—Onus of proof—City of Bombay, limits of—Bombay General Clauses Act (Bom. Act I of 1904), sec. 3 (10).*
- See BOMBAY MUNICIPAL ACT ... 126
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- District Municipal Act (Bom. Act III of 1901)—District Municipal Election Rules, Rule 13—Plaintiff candidate for election as Councillor—Plaintiff's name not published in the list of candidates—Receiving Officer—Suit against Municipality—Declaration—Injunction.*
- See DISTRICT MUNICIPAL ACT ... 409
- NATIVE STATE**—*Law of Native State—Law in British India—Difference—Burden of proof.*] It lies on him who asserts it to prove that the law of the native state differs from the law in British India, and in the absence of such proof it must be held that no difference exists except possibly so far as the law in British India rests on specific Acts of the Legislature.
- RAGHUNATH v. VARJIVANDAS ... (1906) 30 Bom. 578
- NEGOTIABLE SECURITY**—*Transfer of negotiable security by debtor to his creditor—Effect.*
- See COSTS ... 27
- NOTICE OF RESUMPTION**—*Cantonment property—Grant—Offer of compensation—Condition precedent—Notice to one of three executors—Joint occupants.*] Held that the notice of resumption was not a condition precedent to the right of resumption. Even assuming that notice was a condition precedent, that provision had been satisfied by giving notice to one of the three executors who were joint occupants. The provision as to notice was nothing more than a statement of what will be done, when practicable, for the purpose of saving the occupant from such inconvenience as an immediate resumption might involve.
- SECRETARY OF STATE v. VAMANRAV ... (1905) 30 Bom. 137
- NOTICE, SERVICE OF**—*Appeal—Respondent—Failure to carry out the requirements of the Code (Act XIV of 1882), sec. 80.*
- See CIVIL PROCEDURE CODE ... 623
- OBSTRUCTION**—*Decree for possession—Execution of decree—Application for removal of obstruction numbered and registered as suit—Civil Procedure Code (Act XIV of 1882), chap. XIX, div. H.—Adverse possession—Limitation.*
- See CIVIL PROCEDURE CODE ... 115
- OCCUPANCY TENANT**—*Mortgage by occupancy tenant—Forfeiture—Khoti—Khoti Act (Bom. Act I of 1880), secs. 6, 7, 8, 9, 11.*
- See KHOTI ACT ... 290
- ONUS OF PROOF**—*Law of Native State—Law in British India—Difference—Trustee—Confidential relation—Gift.*
- See GIFT ... 578
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- Prohibition of sale of fish except in a market—Sale from a basket placed on the Chowpati foreshore—Private market—City of Bombay Municipal Act (Bom. Act III of 1888), secs. 410, 24, sch. D, (4).*
- See BOMBAY MUNICIPAL ACT ... 126

ORAL EVIDENCE—*Redemption suit—Sale out and out—Written document—Oral evidence for construing the document—Oral evidence permissible to show that contract was obtained fraudulently—Evidence of intention—Admissibility—Dekkhan Agriculturists' Relief Act (XVII of 1879)—Indian Evidence Act (I of 1872), sec. 92.*

See EVIDENCE ACT 426

PAKKI ADAT—*Contract—Incidents of the custom—Employment for reward.*] The plaintiffs in Bombay bought and sold in Bombay cotton and other products on the orders of the defendant who traded at Shahada in Khândesh. In respect of the transactions sued on the plaintiffs before due date had entered into cross contracts of purchase with the merchants to whom they had originally sold goods on the defendant's account. The transactions were entered into on *pakki adat* terms.

The contract of a *pakka adatia* in the circumstances of this case is one whereby he undertakes or guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted or differences paid: in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference.

The evidence in the case establishes the following propositions in connection with *pakki adat* dealings.

1. That the *pakka adatia* has no authority to pledge the credit of the up-country constituent to the Bombay merchant and that no contractual privity is established between the up-country constituent and the Bombay merchant.

2. That the up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross contracts with the Bombay merchant either on his own account or on account of another constituent, [and thereby for practical purposes cancel the same.

3. The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent.

Held, that the defendant knew of the custom, which was not unreasonable as it did not involve a conflict between the *pakka adatia's* interest and duty.

BHAGWANDAS v. KANJI (1905) 30 Bom. 205

PARDON—*Accomplice—Grant of conditional pardon—The pardoned accomplice giving full and true story of the crime, but retracting it in cross-examination before the Sessions Court—Order of Sessions Court to Committing Magistrate to withdraw the pardon—Forfeiture of pardon—Trial of accused for the offence—Commitment—Conviction on his plea of guilty—Irregularity—Illegality—Practice and Procedure—Criminal Procedure Code (Act V of 1898), secs. 337, 338.*

See CRIMINAL PROCEDURE CODE 611

PARSI INTESTATE SUCCESSION ACT (XXI OF 1865)—*Law governing Parsees in the mofussil before the introduction of the Act—Rules of equity and good conscience—Practice of English Equity Courts.*] Before the passing of the Parsi Intestate Succession Act, 1865, the law governing Parsees in the mofussil was the ascertained usage of the community modified by the rules of equity and good conscience. It is true that in such cases the practice of the English Equity Courts would also be followed with necessary modifications, but the reference to these Courts would be not for the purposes of introducing special or peculiar doctrines of English law, but rather with the purpose of elucidating the principles of equity and good conscience and of giving uniform effect to them.

Before the passing of the Succession Act a Parsee husband did not acquire that particular right which in English Law accrued to a husband over his wife's personality.

SHAPURJI v. DOSSABHOY (1905) 30 Bom. 359

PAUPER—*Application to file a suit in forma pauperis*—"Other than his necessary wearing apparel and the subject-matter of the suit"—*Construction*—*Civil Procedure Code (Act XIV of 1852), sec. 401.*

See CIVIL PROCEDURE CODE

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PENSIONS ACT (XXIII OF 1871), SEC. 4—"Suit"—*Execution proceedings*—*Payment of annuity charged on Saranjām lands*—*Liability of the son of the grantor to make the payment*—*Partition of family property*—*Income of a Saranjām village*—*Conciliation agreement*—*Dekkhan Agriculturists' Relief Act (XVII of 1879), sec. 44—Decree.* A conciliation agreement was filed in Court on the 16th June 1882 under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). It effected partition of family property between two brothers, A and N. Under the agreement A undertook to pay to N Rs. 456-0-6 every year, and for the convenience of the parties this was to come out of the Saranjām lands which had fallen to the share of A. The payment was regularly made during the life-time of A, and after his death T, the son of A, continued to make the payment till 1899, when he stopped making any more payment. B, the son of N who had died, then filed a *darkhast* to enforce the payment of 1899-1900. T objected to this *darkhast* on two grounds: (1) that a certificate under the Pensions Act (XXIII of 1871) was necessary; and (2) that A's interest having terminated with his death, the Saranjām must be considered as a fresh grant to the son who was not liable to continue the payment.

Held, (1) that certificate under the Pensions Act (XXIII of 1871) was not necessary, for the word "suit" in section 4 of the Act does not include execution proceedings.

Vajiram v. Ranchordji (1892) 16 Bom. 731, followed.

Held, (2) that A was a trustee in respect of the Rs. 456-0-6 for Narayan, the obligation to pay which would attach to the succeeding holders of the Saranjām and it followed that N and his descendants would have the right to call upon A and his descendants to account for their management of the Saranjām and pay to them Rs. 456-0-6 per annum.

A consent decree can only be set aside upon the same grounds as an agreement can be set aside, *e. g.*, fraud or mistake or misrepresentation.

Per BATTY, J.—"A Court executing a decree cannot question the jurisdiction of the Court which passed it."

"The present application in no way affects property falling within the purview of the Pensions Act, but seeks enforcement against the general assets of the judgment-debtor whose liability under the decree is not made a charge on the Saranjām or cash allowance at all. That liability appears to have been imposed and accepted not as effecting any partition of the Saranjām property, but for the purpose of effecting equality in the partition of non-Saranjām property, the Saranjām property being merely indicated as a fund available to the defendant for the purpose of discharging that liability."

TRIMBAKRAO v. BALVANTRAO

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... (1905) 30 Bom. 101

PLEDGE—*Money secured by a pledge*—*Suit for money lent*—*Limitation*—*Three years from the time of the loan.*

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POWER OF DISPOSAL—*Stridhan*—*Saudayik*—*Bequest by will*—*Power of disposal subject to husband's consent*—*Gurav service*—*Vritti.*

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PRACTICE—*Admission of appeal after prescribed time*—*Application for excuse of delay*—*Limitation Act (XV of 1877), sec. 5.*

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PRACTICE—*Affidavit of documents by order of the Prothonotary against Advocate General—Power of the Court—Prerogative of the Crown—High Court Rule 80a—Civil Procedure Code, sec. 129.*] The position of the Advocate General in India corresponds by statutory enactments to the position held by the Attorney General in England and there is ample authority for the view that generally speaking the attorney General is not called upon to make discovery on oath. An order by the Prothonotary calling upon the Advocate General to show cause why a suit instituted by him should not be dismissed for want of prosecution is not one which is within the jurisdiction of the Prothonotary to make.

THE ADVOCATE GENERAL OF BOMBAY v. ADAMI ... (1905) 30 Bom. 474

—*Chamber proceedings—Certifying Counsel.*] In certifying Counsel in chamber matters the Court ought to have regard to the following circumstances:—

(1) Whether notice has been given by either side of the intention to employ Counsel.

(2) Whether the matter to be dealt with involves the consideration of complicated facts or merely of simple facts.

(3) Whether there arises any substantial question of law which has to be argued and discussed.

PER CURIAM.—The rule as to certifying Counsel has been interpreted as meaning that Counsel should be certified unless it is not a fit case for Counsel.

ZULEKABAI v. AYESHABAI ... (1905) 30 Bom. 196

—*Civil Procedure Code (Act XIV of 1882), sec. 198—Judgment to be pronounced in open Court or on some future day—Notice to the parties or their pleaders or recognized agents—Practice in the Mofussil Courts strongly disapproved of.*

See CIVIL PROCEDURE CODE ... 455

—*Evidence taken in a particular way—Consent of parties—Jurisdiction of the Court.*] In a suit to recover damages for wrongful diversion by the defendants of the course of a brook, the Subordinate Judge, at the desire of both the parties, proceeded to the spot of the diversion, made inspection and examined witnesses on the spot. The depositions of the witnesses were taken down in vernacular by a clerk of the Court. On going through the evidence the Subordinate Judge dismissed the suit, holding that the defendants had not diverted the course of the brook and the plaintiff had not suffered any damage. The plaintiff appealed and raised a preliminary objection to the procedure of the Subordinate Judge. The Judge in appeal held that the Subordinate Judge's procedure vitiated the decision and reversed the decree and remanded the suit for trial on the merits.

On second appeal by the defendants against the order of remand,

Held, reversing the decree of the Judge and restoring the appeal to the file, that the parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way and it is a common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used.

RAMAYA v. DEVAPPA ... (1905) 30 Bom. 109

—*Ex parte order—False representation—Suit for relief inconsistent with order—Set off claimed in written statement—Omission to frame issue—Civil Procedure Code (Act XIV of 1882), secs. 111, 146, 561, 566—Company—Liquidation—Indian Companies Act (VI of 1882), secs. 149, 214.*

Per JENKINS, C. J. :—In the conditions which prevail here, the practice of passing *ex parte* orders, involving the person affected, in serious liability, is much to be deprecated.

AHMEDABAD ADVANCE SPINNING AND WEAVING CO. v. LAKSHMISHANKER.

(1905) 30 Bom. 173

PRACTICE—*High Court—Original Side—Suits by manager of joint Hindu family having minor co-parceners—Minors' names should be added as parties—Will—Construction—Rule against perpetuity—Indian Succession Act (X of 1865), sec. 101.* As a matter of practice suits are not filed on the Original Side of the Bombay High Court by managers representing their minor co-parceners; the practice is to join all persons interested, but it would seem that even if on the face of the plaint there were an allegation of a sole plaintiff that he sued as manager on behalf of a co-parcenary the minor co-parcener would not be bound by the proceedings unless by judicial sale under the decree rights had been created in innocent third parties and no prejudice were shown to the absent minors.

Clause 13 of the will produced in this case was as follows :—

“As to my other property which there is, that is the property situated on the east side of the house of my step-brother, I give the same to my younger son Chiranjiv Mahadev for his life. He shall have no authority either to mortgage or to sell the said property. He shall only receive the income of the said property and I give the property after his death to his son or to his sons in equal shares should there be (any such son or sons). In case he leaves no son behind him my Mukhtyars shall get a son adopted by his wife and thus perpetuate his name. And they shall give the said property to him on his attaining the age of 21 years.”

Held, on a construction of the above clause, that the bequest in favour of a son of Mahadev who might be adopted at any time after Mahadev's death by a widow who might not have been living at the testator's decease was void under section 101 of the Indian Succession Act (X of 1865).

KASHINATH CHIMNAJI v. CHIMNAJI SADASHIV

... (1906) 30 Bom. 477

—*Material defect in suit—Suit relating to public charity—Suit filed by only one plaintiff with the consent of the Advocate General—Amendment of plaint by subsequent addition of second plaintiff—Consent of the Advocate General to the amendment—Civil Procedure Code (Act XIV of 1882), sec. 539.*

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—*Provincial Small Cause Court Act (IX of 1887), sch. II, art. 31—Jurisdiction of Small Cause Court—Suit to recover an ascertained sum as profits of land—Second appeal—High Court.*

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PREROGATIVE OF THE CROWN—*Advocate General—Affidavit of documents by order of the Prothonotary against Advocate General—Power of the Court—Practice—High Court Rule 80a—Civil Procedure Code, sec. 129.*

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RECEIVER— <i>Practice—Suit in ejectment by Receiver—Discharge of Receiver before termination of suit—Devolution of interest—Civil Procedure Code (Act XIV of 1882), sec. 372—Mortgage—Accession to mortgaged property—Transfer of Property Act (IV of 1882), secs. 8, 70—Lease by mortgagor—Sub-lease pendente lite—Rights of mortgagee.] Somjee, a Khoja merchant, died in 1885, leaving as his survivors four sons by his first wife (who predeceased him), his second wife Labai, and four sons by Labai.</i>	
By his will, Somjee gave the whole of his moveable and immoveable property to his sons by his first wife, directing them out of such property to give to Labai and her sons Rs. 30,000 within six years of his death.	
On the 12th January 1899 Somjee's sons by his first wife mortgaged certain of the properties to the Bank of Bombay.	
In 1903, the Bank having advertised such properties for sale under a power reserved to them by the mortgage-deed, Somjee's sons by Labai (who had since died) brought a suit (No. 554 of 1903) against Somjee's sons by his first wife and the Bank of Bombay, claiming that the properties could only be sold subject to the charge in their favour.	
On the 14th January 1904, the Bank assigned the mortgage to Dwarkadas.	
On the 26th January 1904, Mr. Macleod was appointed a Receiver by the Court.	
On the 24th February 1904, the Receiver was authorised to file ejectment suits where necessary.	
On the 18th March 1904, the Receiver as plaintiff No. 1 and Dwarkadas as plaintiff No. 2 filed the present suit to eject Kissan, the first defendant, from a portion of the property mortgaged to the Bank.	
Kissan claimed to be in possession under a lease from Goolani, the second defendant, one of the four sons of Somjee by his first wife.	

After the commencement of the suit, Suit No. 554 of 1903 was disposed of in favour of the Bank of Bombay and the Receiver was discharged.

The first defendant contended that Dwarkadas had no right to join the Receiver in bringing the suit, that the moment the Receiver was discharged, his power to sue and with it the suit itself came to an end.

Held, that the Bank or its assignee Dwarkadas had a right to come in under section 372 of the Code of Civil Procedure and apply that the suit be continued by one or the other of them. No such application was in fact made because Dwarkadas was already on the record as plaintiff No. 2. The joinder of Dwarkadas as a co-plaintiff with the Receiver, though it was not perhaps strictly speaking legal at the time, did not constitute a misjoinder.

Held, also, that a theatre, erected by the mortgagors on the land, after the execution of the mortgage, was, in the absence of a contract to the contrary, included in the mortgage.

The Transfer of Property Act makes no distinction between free-hold and leasehold property for the purposes of the rule of law embodied in sections 8 and 70 of the Act. In this respect the Act reproduces the English law, which is, that all things which are annexed to the property mortgaged are part of the mortgage security and therefore the deed need contain no mention of structures or fixtures, unless a contrary intention can be collected from the deed.

Held, also, that if a mortgagor left in possession grants a lease without the concurrence of the mortgagee, the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them.

MACLEOD v. KISSAN ... (1904) 30 Bom. 250

RECTIFICATION—*Specific Relief Act (I of 1877), sec. 31—Sale—Suit for specific performance—Mutual mistake—Clear proof.* To establish a right to rectification of a document it is necessary to show that there has been either fraud or mutual mistake. Under the terms of section 31 of the Specific Relief Act (I of 1877), it is necessary that the Court should find it clearly proved that there was such mistake.

"A person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought."

Fowler v. Fowler (1859) 4 D. & J. 250 at p. 264, followed and applied.

MADHAVJI C. RAMNATH ... (1906) 30 Bom. 457

REDEMPTION SUIT—*Sale out-and-out—Construction—Evidence of intention—Admissibility—Agriculturists' Relief Act (XVII of 1879)—Indian Evidence Act (I of 1872), sec. 92.*

See EVIDENCE ACT ... 426

REFERENCE—*Reasonable doubt—Point clearly decided by the Rulings of the High Court of Presidency—Civil Procedure Code (Act XIV of 1882), ch. 46.*

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—BY COLLECTOR—*Land Acquisition Act (I of 1894), secs. 12 and 18—Notice by the Collector—Construction of statute—Meaning of word "immediately."* *Held*, that the conditions prescribed by section 18 of the Act are the conditions to which the power of the Collector to make the reference is subject, and these conditions must be fulfilled before the Court can have jurisdiction to entertain the reference.

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REFERENCE BY COLLECTOR—*Land Acquisition Act (I of 1894), sec. 18 (2)—*
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REGISTRATION ACT (III OF 1877), SECS. 17, 18 CLS. (d) AND (f), 21, 24, AND 77—
Transfer of Property Act (IV of 1882), secs. 6, 19 and 21—Indian Succession Act (X of 1865), sec. 107—Document whereby a Mahomedan daughter relinquished her right of inheritance to her father's property—Registration—Refusal to register on the ground that the document did not contain sufficient description of property—Discretion of Registrar—Jurisdiction of Civil Court—Vested or contingent interest—"Spes Successionis"—Alteration not affecting the legal effect of the contract.]

A Mahomedan daughter executed in favour of her father a document under which, in consideration of her receiving Rs. 9,000, she relinquished her right of inheritance to the father's property and also to certain ornaments directed to be given to her by her mother. The document was presented for registration to the Sub-Registrar, who accepted the registration fee, which was endorsed on the document, and subsequently refused to register the document on the ground that its execution was denied and that it did not contain sufficient description of the immoveable property to which it related—sections 35 and 21 of the Registration Act (III of 1877). On appeal to the Registrar, he held that the execution of the document was proved, but refused registration on the ground that the provisions of section 21 had not been complied with. Thereupon a suit having been filed under section 77 of the Registration Act (III of 1877) for a decree directing registration of the document,

Held, allowing the claim, that section 21 of the Registration Act (III of 1877) did not apply. The document could not be treated as relating to property because it related to mere heirship: much less could it relate to immoveable property capable of being described and identified. Supposing that section 21 was applicable and that the document related to immoveable property, then the conditions of the section were satisfied, because under the document the executant gave up her right of inheritance to such of her father's immoveable property as he might leave on his death, and that this is not only a sufficient but the only description that could be given of the property.

Held, further, that the document did not fall within the category of any of the documents mentioned in section 17 of the Registration Act (III of 1877). It fell within clauses (d) and (f) of section 18 of the Act. It fell within clause (d) of section 18 because there was a release by the executant of her right to certain ornaments to which she had a present right. It fell within clause (f) because it was a document under which the executant agreed to release her right as heir to her father and that belonged to a class of documents not mentioned in section 17 and not falling within the preceding clauses of section 18.

Where a Sub-Registrar or Registrar receives a document and the registration fee, and endorses the payment on the document and issues a commission for taking evidence, he must be regarded as having exercised his discretion under section 21 of the Registration Act (III of 1877) and accepted the document for registration. But even if there was at first no acceptance under that section, that being a matter in his discretion, the Court cannot, under section 77 of the Act, question the subsequent exercise of such discretion. The discretion under section 21 arises where a non-testamentary document "relates to immoveable property". Where it does not so relate, the section cannot apply and the discretion cannot arise. It is open for a Civil Court to enquire into such question in a suit under section 77 of the Act.

The right of a son or daughter or other heir of a person to inherit his property is not an estate in remainder or in reversion in immoveable property or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent right. It does not come within the definitions of "a vested interest" in section 19 of the Transfer of Property Act (IV of 1882), or of "a contingent interest" in section 21

of the Act and section 107 of the Indian Succession Act (X of 1865). So far from being a vested or a contingent right, or a right in present or in future, it is, in the language of clause (a) of section 6 of the Transfer of Property Act (IV of 1882), "the chance of an heir-apparent succeeding to an estate, or "a mere possibility" of succession which cannot be transferred.

A mere *spes successionis* is unknown to, and not recognised by, Mahomedan Law.

An alteration to be material for the purpose of registration must affect the legal effect of the contract so as to make it cease to be the same instrument.

ABDOOL HOOSEIN v. GOOLAM HOOSEIN ... (1905) 30 Bom. 304

RES JUDICATA—*Civil Procedure Code (Act XIV of 1882), section 13—Consent decree—Fraud—Defence—Limitation.*] On the 4th June 1893, the defendant signed an acknowledgment (Ruzu) for Rs. 11,534-15-0 in favour of the shop of Bakhatram Nanuram, represented in the suit by the plaintiff.

On the 19th June 1894, the defendant paid Rs. 400 cash, and a Hundi for Rs. 600, and for the balance Rs. 10,534-15-0 he passed an instalment-bond payable by yearly instalments of Rs. 1,000 with interest at 6 per cent. on overdue instalment.

The *Hundi* for Rs. 600 was dishonoured in 1895 and the firm sued the defendant for its amount plus Rs. 45 interest in Suit No. 249 of 1895. The defendant pleaded want of consideration for the Hundi and further said that the acknowledgment had been passed in ignorance of the true state of accounts and because the facts had been concealed and misrepresented. A Commissioner was appointed to examine the plaintiff's accounts. He reported that the debt really due on the 4th June 1893 was Rs. 3,016-3-0 and not Rs. 11,534-15-0 as stated in the Ruzu. Upon this the claim in the suit was decreed without an adjudication of other questions raised by the defendant.

In 1897, the firm sued the defendant for the first and second instalments which had become due under the instalment-bond. This was Suit No. 105 of 1897 and was for Rs. 2,000 and interest. The defendant admitted the claim, which was decreed accordingly by consent.

In 1898, the defendant instituted Suit No. 412 of 1898 against the Bakhatram firm for cancellation of the instalment-bond, alleging that it was obtained by misrepresentation and fraud, and was void in law having been passed in respect of wagering transactions and that nothing was due under it. The final decision in the case was passed by the High Court, who, without giving any decision on the merits, dismissed the suit as time-barred.

Pending the above proceedings, the plaintiff filed this suit in 1902 against the defendant on the instalment-bond to recover the 3rd, 4th and 5th instalments amounting in all to Rs. 3,000 and interest. The defendant pleaded *inter alia* that the instalment-bond and prior Ruzu were obtained from him by fraud and misrepresentation and that the debt due was one arising from wagering contracts unenforceable by law. No findings were recorded on these points, as the Subordinate Judge held that the defendant was precluded by the decrees in Suits No. 249 of 1895 and 105 of 1897 from raising any of his contentions. The claim was decreed with costs. On appeal, the District Judge also came to the conclusion that the bar of *res judicata* operated against the defendant, but held that the claim as to the 3rd and 4th instalments was barred by limitation.

Both the parties preferred appeals to the High Court.

Held by ASTON, J.—(1) that unless it be established that the pleas which the defendant had raised in the present suit and had not been allowed to prove, would, if proved in the Hundi Suit No. 249 of 1895, have reduced the amount actually due by him in June 1893 to less than Rs. 600, plus the Rs. 400 paid in cash, the decision in the Hundi suit could not operate as *res judicata* in respect of the said

pleas, for the matter which might and ought to be made a ground of defence in the Hundi suit must be a ground of defence to "the claim actually made" in the said former suit.

(2) that the plea that the consideration for the instalment-bond partly failed because of the reasons set up in the pleas aforesaid, would have been irrelevant in the later Suit No. 195 of 1897 for the first two instalments of Rs. 1,000 due under that bond, unless by setting up these pleas and proving them the claim in that later suit for Rs. 2,000 the amount of the first two instalments would have been reduced.

Held by SCOTT, J.—(1) that before the present suit was brought the issue as to consideration had not been raised except with reference to the Hundi and had been heard and determined in Suit No. 249 of 1895 with reference to that document alone. The defendant was, therefore, not barred by *res judicata* from pleading in this suit that the bond was no longer supported by consideration.

(2) that the lower Court was wrong in holding that the defendant was barred by section 13 of the Civil Procedure Code (Act XIV of 1882) from raising the questions of fraud or wager as vitiating the bond as a security for the payment of the remaining instalments. The issue in Suit No. 249 of 1895 was a sufficient issue for the disposal of the case on the Hundi and in that suit the defendant's liability under the Hundi was the only matter in issue. In Suit No. 105 of 1897 there was no hearing and disposal of any matter in issue and the provisions of section 13 had, therefore, no application. Regard must be had to the reason and scope of the consent decree.

A defendant is entitled to resist a claim made against him by pleading fraud, and he is entitled to urge that plea though he may have himself brought an unsuccessful suit to set aside the transaction, and is not under certain circumstances like those in hand precluded from urging that plea by lapse of time.

Rangnath v. Govind (1904) 28 Bom. 639, followed.

Mahomed v. Ezekiel (1905) 7 Bom. L. R. 772, not followed.

MINALAL SHADIRAM v. KHARSETJI ... (1906) 30 Bom. 395

RES JUDICATA—*Gujarat Talukdars' Act* (Bom. Act VI of 1888), secs. 10, 11, 16 and 17—*Talukdari Settlement Officer—Decision—Appeal—Second appeal—Subsequent suit in a Court of competent jurisdiction.* Certain proceedings which had arisen out of an application to the Talukdari Settlement Officer under section 11 of the Gujarat Talukdars' Act (Bom. Act VI of 1888) went up to the High Court in second appeal.

Subsequently the same question having arisen between the same parties in a regular suit in a Court of competent jurisdiction,

Held, that the question was not *res judicata*. A Talukdari Settlement Officer is not a Court of jurisdiction competent to try the suit. He is an administrative officer according to the machinery prescribed by the Bombay Legislature.

"In considering the competency of a Court for the purpose of deciding on a question of *res judicata*," the Court "must look to the powers of the Court in which the suit was instituted, and not to the powers of the Court by which that suit was decided on appeal."

Toponidhee Dhirji Gir Gosain v. Sreeputty Sahanee (1880) 5 Cal. 832 at p. 838, followed.

MALUBHAI v. SURSANGJI ... (1905) 30 Bom. 220

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Held, that as the defendant had preferred an appeal and it was dismissed under section 551 of the Code, his application to the first Court for review of judgment could not be entertained.

It is open to the person aggrieved, after an appeal has been preferred, to apply for a review, provided his appeal is withdrawn. As by the cancellation of the order for admission of an appeal it is to be taken that no appeal was admitted, so by withdrawal of the appeal it must be treated as though no appeal was preferred. But when an appeal is actually dismissed, it was in fact preferred and cannot be regarded as not having been preferred.

RAMAPPA v. BHARMA (1906) 30 Bom. 625

—*Civil Procedure Code (Act XIV of 1882), sections 623 and 626—Order in execution—Decree—Order rejecting application for review—Appeal.* An order in execution, being a decree under the Civil Procedure Code (Act XIV of 1882), was passed on the 20th November 1902 and a supplementary order as to costs was made on the 20th December following. On the 3rd August 1903 the party aggrieved by the latter order applied under section 623 of the Civil Procedure Code for a review of judgment. Notice was issued to the opposite party and the application for review was heard with the result that the Judge after disposing of certain technical objections proceeded to deal with the case on the merits and having done so he rejected the application for review with costs on the 14th September 1903. Against the said order the applicant having appealed,

Held, that the order rejecting the application for review was not appealable. The proper procedure would be to appeal from the order of the 20th December 1902 relating to costs.

A petition of review involves three stages of procedure. The first stage commences ordinarily with an *ex parte* application under section 623 of the Civil Procedure Code. The Court may then either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or rejected and the hearing of the rule may involve to some extent an investigation into the merits. If the rule is discharged then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached. The case is re-heard on the merits and may result in a repetition of the former decree or some variation of it. Though in one aspect the result is the same whether the rule be discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for in the latter case, the whole matter having been re-opened, there is a fresh decree. In the former case the parties are relegated to, and still rest, on the old decree.

VADILAL v. FULCHAND (1905) 30 Bom. 56

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<i>Held, that the suit was one cognizable by a Court of Small Causes; and that, therefore, no second appeal lay.</i>	
GIRJABAI v. RAGHUNATH	(1905) 30 Bom. 147
<i>Suit of the nature cognizable in the Court of Small Causes—Execution of decree.] No second appeal lies against an order in execution of a decree in a suit of the nature cognizable in the Court of Small Causes.</i>	
<i>Shyama Charan Mitter v. Debendra Nath Mukerjee (1907) 27 Cal. 484, followed.</i>	
NARAYAN v. NAGINDAS	(1905) 30 Bom. 113
SELLER'S DESIGN— <i>Trade mark—Rights of manufacturer—Partnership—Dis-solution—Partner continuing the business—Right to sue in respect of trade mark.</i>	
<i>See TRADE MARK</i>	61
SET-OFF— <i>Suit for relief inconsistent with order—Set-off claimed in Written State-ment—Omission to frame issue—Civil Procedure Code (Act XIV of 1882), sec-tions 111, 146, 561, 566—Company—Liquidation—Indian Companies Act (VI of 1882), sections 149, 214—Meaning of "legally recoverable"—Ex parte order—Practice.</i>	
<i>See CIVIL PROCEDURE CODE</i>	173

SMALL CAUSE COURT—*Suit of the nature cognizable in the Court of Small Causes—Execution of decree—Second appeal.*] No second appeal lies against an order in execution of a decree in a suit of the nature cognizable in the Court of Small Causes.

Shyama Charan Mitter v. Debendra Nath Mukerjee (1900) 27 Cal. 484, followed.

NARAYAN v. NAGINDAS ... (1905) 30 Bom. 113

SMALL CAUSE COURT ACT (IX OF 1837), Schedule II, Article 31—*Jurisdiction of Small Cause Court—Suit to recover an ascertained sum as profits of land—Second appeal—High Court—Practice.*] The plaintiff sued to recover three specific sums of money amounting to Rs. 447-11-0, being her share of the revenues and profits of three sets of lands, alleging in her plaint that the money had been wrongly received by the defendant :—

Held, that the suit was one cognizable by a Court of Small Causes; and that, therefore, no second appeal lay.

GIRJABAI v. RAGHUNATH ... (1905) 30 Bom. 147

SOLICITOR—*Costs—Solicitor's lien for costs—Summary jurisdiction of Court over suitors—Compromise by parties without knowledge of solicitor—Solicitor's right to oppose motion—Negotiable security—Transfer of negotiable security by debtor to his creditor—Effect.*] By a private compromise between Cullianji, the plaintiff in the first suit, and Lakshuibai, the 6th defendant, who was also the plaintiff in the second suit, it was agreed that the plaintiff should give to Lakshuibai certain immoveable property and Rs. 15,853 in full settlement of her claim and a further sum of Rs. 500 for her solicitor's costs.

On the 21st February 1904, possession of the immoveable property was given and a sum of Rs. 500 paid to Lakshuibai. Cullianji also gave to her 3 hundis for Rs. 5,000, Rs. 5,000 and Rs. 5,853 respectively, but the hundis were dishonoured on their due dates.

In March and April 1904, the plaintiff paid 2 sums of Rs. 5,000 to Lakshuibai, by cheque, in lieu of the 2 hundis for Rs. 5,000.

On the 4th June 1904, Lakshuibai's solicitor gave notice to the plaintiff, that he had a lien for costs on the sum of Rs. 15,853 agreed to be paid by the plaintiff to his client.

On the 22nd of June 1904, the plaintiff paid the sum of Rs. 5,853 to Lakshuibai, in cash, in respect of the hundi for Rs. 5,853, which was dishonoured.

The plaintiff, thereupon, moved for an order, authorizing the delivery to him of certain property, alleging that he had settled and satisfied the claims of Lakshuibai. Lakshuibai's solicitor opposed the motion on the ground that the settlement and satisfaction were collusive transactions intended to cheat him out of his costs and asked the Court to order the plaintiff to deposit the sum of Rs. 9,000 as security for the same.

Held, that in the absence of fraud or collusion between the parties, the solicitor was entitled to be paid his taxed costs, by the plaintiff, up to Rs. 5,853, being the amount paid by the plaintiff after notice of the lien.

The High Court of Bombay has a summary jurisdiction over its suitors for the purpose of enforcing a solicitor's lien for costs; and in enforcing it the Court must be guided by the principles of English law.

Whether the solicitor moves the Court by an application of his own or appears to oppose a motion of the party against whom the lien for costs is alleged to arise, in either case he calls in aid the equitable interference of the Court under its summary jurisdiction.

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<i>Devkabei v. Jefferson, Bhaishankar and Dinsha</i> (1886) 10 Bom. 248, and <i>Khetter Kristo Mitter v. Kally Prosunno Ghose</i> (1898) 25 Cal. 887, followed. <i>Ramdoyal Serowie v. Ramdeo</i> (1899) 27 Cal. 269, dissented from.	
<i>Held</i> , also, that the giving of a negotiable security by the plaintiff to Lakshmi-bai operated as a conditional payment only and not as a satisfaction of the debt.	
<i>In re Romer and Haslam</i> [1893] 2 Q. B. 286 at p. 296, followed.	
CULLIANJI v. RAGHOWJI	(1904) 30 Bom. 27
SPECIFIC PERFORMANCE— <i>Specific Relief Act</i> (I of 1877), section 31— <i>Sale—Rectification—Mutual mistake—Clear proof.</i>	
See SPECIFIC RELIEF ACT	457
SPECIFIC RELIEF ACT (I OF 1877), section 31— <i>Sale—Suit for specific performance—Rectification—Mutual mistake—Clear proof.</i>] To establish a right to rectification of a document it is necessary to show that there has been either fraud or mutual mistake. Under the terms of section 31 of the Specific Relief Act (I of 1877), it is necessary that the Court should find it clearly proved that there was such mistake.	
“A person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought.”	
<i>Fowler v. Fowler</i> (1859) 4 D. & J. 250 at page 264, followed and applied.	
MADHAVJI v. RAMNATH	(1906) 30 Bom. 457
SPES SUCCESSIONIS— <i>Mahomedan Law.</i>] A mere <i>spes successionis</i> is unknown to, and not recognised by, Mahomedan Law.	
ABDOOL HOOSAIN v. GOOLAM HOOSAIN	(1905) 30 Bom. 304
STATUTE, CONSTRUCTION OF— <i>Land Acquisition Act</i> (I of 1894), sections 12 and 18— <i>Notice by the Collector—Reference to Court—Meaning of word “immediately.”</i>] Where a statute or written contract provides that a certain thing shall be done “immediately” regard must be had, in construing that word, to the object of the statute or contract as the case may be, to the position of the parties and to the purpose for which the Legislature or the parties to the contract intend that it shall be done immediately.	
IN RE LAND ACQUISITION ACT	275
STRIDHAN— <i>Deceased co-widow—Stridhan property of the deceased—Surviving co-widow entitled to succeed—Nearest surviving Sapinda of the husband—Mitakshara.</i>	
See MITAKSHARA	333
— <i>Hindu Law—Inheritance—Law of Bombay School—Mitakshara—Vyavahara Mayukha—Succession to Stridhan—Co-widow—Husband's brother—Husband's brother's son—Deed of gift, construction of—Absolute or limited estate of inheritance—Vyavahara Mayukha, chap. IV, sec. 10, placita 28 and 30, construction of.</i>	
See HINDU LAW	431
— <i>Saudayik—Bequest by will—Power of disposal subject to husband's consent—Gurav service—Vritti.</i>] Saudayik stridhan is that which is obtained by a married woman or by a virgin in the house of her husband or of her father, from her brother or parents.	

Except in the kind known as Saudayik, a woman's power of disposal over her stridhan is during coverture subject to her husband's consent, and without such consent she cannot bequeath it by will when she is survived by her husband, who is not shown ever to have consented to the will.

BHAU v. RAGHUNATH ... (1905) 30 Bom. 229

STRIDHAN—*Succession—Full brothers of the husband are entitled to succeed in preference to his half-brothers—Mitakshara—Hindu Law.*

A Hindu widow died without issue leaving her surviving one whole brother and three half-brothers of her deceased husband:

Held, that under the Mitakshara by which the parties were governed, for the purpose of succession to the non-technical stridhan of a widow who has died without issue, the whole brother of her deceased husband is to be preferred to his half-brother.

PARMAPPA v. SHIDEAPPA ... (1906) 30 Bom. 607

SUBJECT MATTER OF SUIT—*Application to file a suit in forma pauperis—"other than his necessary wearing apparel and the subject matter of the suit"—Construction—Civil Procedure Code (Act XIV of 1882), section 401.*

See CIVIL PROCEDURE CODE ... 593

SUCCESSION—*Cutchi Memons—Marriage in approved form—Hindu Law.*

See CUTCHI MEMONS ... 197

—————*Kutchi Memons—Hindu Law—Sons administering the property of their deceased father.*

See KUTCHI MEMONS ... 270

—————*Stridhan—Full brothers of the husband are entitled to succeed in preference to his half-brothers—Mitakshara—Hindu Law.*

See HINDU LAW ... 607

SUCCESSION ACT (INDIAN) (X OF 1865), SECTIONS 20, 22, 105—*Relationships contemplated by the Act are legitimate relationships only—Gift by will of the residue to such charities as the trustees may think deserving, is good.* The Indian Succession Act (X of 1865) contemplates only those relationships which the law recognizes, that is, those flowing from a lawful wedlock.

The gift, by will, of the residue to "such charities as the trustees may think deserving" is a good gift, the objects being wholly charitable.

SMITH v. MASSEY ... (1906) 30 Bom. 500

Rule against perpetuity.

SECTION 101—*Will—Construction—*

See WILL ... 477

interest.

SECTION 107—*Vested or contingent*

See REGISTRATION ACT ... 304

SUIT FOR MONEY LENT—*Money secured by a pledge—Limitation—Three years from the time of the loan.* A suit for the recovery of money secured by a pledge is a suit for money lent. The period of limitation is three years from the time the loan is made.

VELLAPPA v. DESAYAPPA ... (1905) 30 Bom. 218

THEATRE—*City of Bombay Municipal Act (Bom. Act III of 1888), section 249—Place of public resort.*] A theatre is a place of public resort and as such falls within the purview of section 249 of the City of Bombay Municipal Act (Bom. Act III of 1888).

EMPEROR *v.* DWARKADAS ... (1906) 30 Bom. 392

THROUGH SPECIAL TRAIN—*Gambling in a railway carriage—Public place—Railway track—Public having no right of access except passengers—Bombay Prevention of Gambling Act (Bom. Act IV of 1877), section 12.*

See GAMBLING ... 348

TRADE MARK—*Seller's design—Rights of manufacturer—Partnership—Dissolution—Partner continuing the business—Right to sue in respect of trade mark.*] In the year 1892 M designed a label for goods ordered by his firm C. J. & Co. from J. F. A. & Co., the London manufacturers. The label consisted of a youth and girl in fancy dress and goods bearing the label became known in Bombay and up country as "Jori Mal."

By M's request the name of C. J. & Co. was printed on the border of the label in Persian and Gujaráti characters.

In 1897 M's partner having retired from the firm, M, the 4th plaintiff, continued the business of C. J. & Co., with the other plaintiffs, under the name, style and firm of V. & Co.

V. & Co. then ordered goods bearing the label from B. W. A. & Co., in London, instructing them to place on the border of the label, the name of their firm, V. & Co., in English, Persian and Gujaráti characters.

In 1898, B. W. A. & Co. having become insolvent, the plaintiffs imported goods, without the label, from B. & Co., the defendants, who had taken up the business of B. W. A. & Co.

In 1899, the plaintiffs requested the defendants to arrange, if possible, to send out the goods under the "Jori Mal" label.

In 1900, the defendants, having purchased from B. W. A. & Co. their rights under the label, proceeded to place it on goods manufactured for and sold by them, leaving the border of the label blank, or inserting on the border, their own name, or, by special request, the names of the constituents, by whom the goods were ordered.

It was not expressly agreed, that B. W. A. & Co., should not supply goods under the label to constituents other than the plaintiffs.

The lower Court held, *inter alia*, (1) that the plaintiffs had lost their right to the exclusive user of the label as against the defendants, and (2) that the plaintiffs were not entitled to the rights, if any, of the firm of C. J. & Co., to the label.

On appeal, by the plaintiffs,

Held, the plaintiffs have failed to establish an exclusive right to the label.

In the absence of contract, a seller of goods has no exclusive right to a mark, which merely denotes goods which he sells, even though he may have designed the mark himself.

Such a mark may be a mere quality mark, indicating the reputation of the goods, irrespective of the reputation of the seller.

Obviously every trader being entitled, if not bound, to state truthfully the quality of the goods he sells, no one trader can restrain any other from exercising that right by a mark truthfully indicating quality. For neither of the two grounds for protection exists in such case. His reputation is not injured and no deception is practised on the public.

To give an exclusive right there must be something further. The mark must amount to a representation that the quality is wholly or in part due to and guaranteed by some person or persons concerned in or connected with the origin or history of the goods. In such cases the public are invited to rely on the reputation of the persons denoted, and no other person can, without their authority, make such representation. It is a question of evidence in each case, whether there is false representation or not.

Held, also,

A trade mark, belonging to a firm, would, in the absence of express provisions to the contrary, as part of the partnership assets, be available for any partner of that firm, carrying on that business.

Hirsch v. Jonas (1876) 3 Ch. D. 584, followed. *Damodar Ruttonsey v. Hormusjee Adarjee* (unreported), distinguished.

VADILAL v. BURDITT & Co. ... (1905) 30 Bom. 61

TRANSFER OF PROPERTY ACT (IV OF 1882), SECTIONS 6, 19, 21—*Indian Succession Act* (X of 1865), section 107—*Document whereby a Mahomedan daughter relinquished her right of inheritance to her father's property—Vested or contingent interest—Registration Act* (III of 1877), sections 17, 18 clauses (d) and (f), 21, 24.] *Held*, that the right of a son or daughter or other heir of a person to inherit his property is not an estate in remainder or in reversion in immoveable property or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent right. It does not come within the definitions of "a vested interest" in section 19 of the Transfer of Property Act (IV of 1882), or of "a contingent interest" in section 21 of the Act and section 107 of the Indian Succession Act (X of 1865). So far from being a vested or a contingent right, or a right in present or in future, it is, in the language of clause (a) of section 6 of the Transfer of Property Act (IV of 1882), "the chance of an heir-apparent succeeding to an estate," or "a mere possibility" of succession which cannot be transferred.

ABDOOL HOOSAIN v. GOOLAM HOOSAIN ... (1905) 30 Bom. 304

SECTIONS 8, 70—*Mortgage—Accession to mortgaged property.*] *Held*, that a theatre, erected by the mortgagors on the land, after the execution of the mortgage, was, in the absence of a contract to the contrary, included in the mortgage.

The Transfer of Property Act makes no distinction between free-hold and lease-hold property for the purposes of the rule of law embodied in sections 8 and 70 of the Act. In this respect the Act reproduces the English law, which is, that all things which are annexed to the property mortgaged are part of the mortgage security and therefore the deed need contain no mention of structures or fixtures, unless a contrary intention can be collected from the deed.

MACLEOD v. KISSAN ... (1904) 30 Bom. 250

TRANSFER OF SUIT—*Civil cases—Power of High Court to remove suit from Court of Political Resident at Aden—Letters Patent of High Court, 1865, clause 13—Superintendence of High Court—Charter Act* (21 and 25 Vict., c. 104), section 15—*Aden Courts' Act* (II of 1864).] The Civil Court of the Political Resident at Aden, as constituted by the Aden Courts' Act (II of 1864), is subject to the superintendence of the High Court at Bombay within the meaning of clause 13 of the amended Letters Patent, 1865; and the High Court has power to remove a suit from that Court to itself for trial and determination.

MUNICIPAL OFFICER, ADEN v. ISMAIL HAJEE ... (1905) 30 Bom. 246

TRUSTEE—*Cestui que trust—Confidential relation—Law of Native State—Law in British India—Difference—Burden of proof.*

See NATIVE STATE ... 578

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TRUSTS ACT (II OF 1882), SECTION 20— <i>Investment by guardians of minor's property—Principles governing investment by guardians—Guardian and Wards Act (VIII of 1890).</i>	
<i>See</i> GUARDIANS AND WARDS ACT	561
VENDOR AND PURCHASER— <i>Contract—Construction—Custom of trade in Bombay—Principal and agent—Goods ordered nett free godown—No remuneration fixed—Variance between printed and written terms—Liability to account.</i>	
<i>See</i> CONTRACT	1
VRITTI— <i>Garav service—Stridhan—Saudayik—Bequest by will—Power of disposal subject to husband's consent.</i>	
<i>See</i> STRIDHAN	229
WAGERING CONTRACTS— <i>Agreement to pay differences—Surrounding circumstances—Form of contract not of moment—Contract Act (IX of 1872), section 30—Bombay Act III of 1865.] The law which is contained in section 30 of the Contract Act (IX of 1872) and in Bombay Act III of 1865, is that the Court must not only consider the terms in which the parties have chosen to embody their agreement, but must look to the whole nature of the transaction or institution, whatever it may be, and must probe among all the surrounding circumstances, including the conduct of the parties, with a view to ascertain what in truth was the real intention or understanding between the parties to the bargain. The actual form of the contract is of little moment, for gamblers cannot be allowed to force the jurisdiction of the Courts by the expedient of inserting provisions which might in certain events become operative to compel the passing of property though neither party anticipated such a contingency.</i>	
The Court should be astute to discover what in fact was the common intention of both parties, and should do all that is possible to see through the ostensible and apparent transaction into the underlying reality of the bargain.	
MOTILAL v. GOVINDRAM (1905) 30 Bom.	88
WEIGHT OF EVIDENCE— <i>Alleged substitution of one boy for another in infancy—One-sided enquiries made to support allegation—Evidence not judicially taken and without notice to interested parties.</i>	
<i>See</i> EVIDENCE	223
WILL— <i>Construction—Rule against perpetuity—Indian Succession Act (X of 1865), section 101.] Clause 13 of the will produced in this case was as follows:—</i>	
<i>"As to my other property which there is, that is the property situated on the east side of the house of my step-brother, I give the same to my younger son Chiranjiv Mahadev for his life. He shall have no authority either to mortgage or to sell the said property. He shall only receive the income of the said property and I give the property after his death to his son or to his sons in equal shares should there be (any such son or sons). In case he leaves no son behind him my Mukhtyars shall get a son adopted by his wife and thus perpetuate his name. And they shall give the said property to him on his attaining the age of 21 years.</i>	
<i>Held</i> , on a construction of the above clause, that the bequest in favour of a son of Mahadev who might be adopted at any time after Mahadev's death by a widow who might not have been living at the testator's decease was void under section 101 of the Indian Succession Act (X of 1865).	
KASHINATH CHIMNAJI v. CHIMNAJI SADASHIV (1905) 30 Bom.	477
<i>"Such debts and liabilities as aforesaid"—"Such"—Construction—Time—no part of the description.] A will contained a clause providing,—</i>	
<i>"11. As regards the remaining one equal fourth share of the said residue I direct that if at the time the said residue is divisible my son Ardeshr shall have</i>	

no debts due by him or any liabilities likely to result in a debt or debts of more than Rupees five thousand the said share shall be made over to him absolutely, but if otherwise then I direct that the said share shall be held or settled by my Executors upon trust until the said Ardeshir shall be free from such debts and liabilities or until he shall die to apply the income of the same in or towards the maintenance and support of him, his wife and children or such or one or more of them the said Ardeshir, his wife and children as the trustees may at their absolute discretion determine and the education or other benefit of such children including their marriage, but when and so soon as the said Ardeshir shall be free from such debts and liabilities as aforesaid upon trust to pay the same and all unapplied income, if any, to him the said Ardeshir absolutely."

A question having arisen as to whether the expression "when and so soon as he the said Ardeshir shall be free from such debts and liabilities as aforesaid" had reference only to debts and liabilities existing at the time when the residue was divisible.

Held, that the debts and liabilities to which the clause related were debts or any liabilities likely to result in a debt or debts of more than Rupees five thousand and it was with debts of that description that a comparison was implied by the word *such*. Time was no part of their description and reference was made to time only to indicate the event on which certain consequences were to follow according as debts and liabilities of the description indicated did or did not exist.

BAI JAIRI v. N. C. MACLEOD ... (1906) 30 Bom. 493

WORDS AND PHRASES:—

-----	"Cause of action" meaning of				
See LETTERS PATENT	...	...	...	...	157
-----	"City of Bombay" limits of.				
See BOMBAY MUNICIPAL ACT	...	...	...	...	126
-----	"Disturbance" meaning of.				
See EASEMENTS ACT	...	...	...	...	319
-----	"Immediately" meaning of.				
See LAND ACQUISITION ACT	...	...	...	...	275
-----	"Legally recoverable" meaning of.				
See CIVIL PROCEDURE CODE	...	...	...	...	173
-----	"Notice" meaning of.				
See LAND ACQUISITION ACT	...	...	...	...	275
-----	"Physical comfort" meaning of.				
See EASEMENTS ACT	...	...	...	...	319
-----	"Public place" meaning of.				
See GAMBLING	...	...	...	...	343
-----	"Street" construction of.				
See BOMBAY MUNICIPAL ACT	...	...	...	...	553